

The Central Law Journal.

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A law was passed by the last legislature of Missouri, providing for the taxation of all express companies doing business in the State over rented or leased lines, the tax being \$2 on every \$100 received or charged for carrying freight within the State. An annual report of each year's business was required to be made to the State Auditor. The law was resisted, upon the ground that it was discriminative in its operations in favor of railroad companies, of express companies owning their own lines, and of steamboat lines, and on the further ground that it levied a tax on interstate commerce. A temporary injunction restraining the auditor from enforcing the law was obtained, but this has been dissolved by the United States Court at Kansas City, which has declared the law valid.

The question whether a State court can enjoin a national bank, was lately raised before Judge Holmes, of the Massachusetts Supreme Court, in a matter arising out of the recent failure of Potter, Lovell & Co. A temporary injunction was sought to restrain a national bank from disposing of certain notes made by an Ohio firm, and upon which the Boston firm claimed that it had not realized anything. Judge Holmes followed a decision of the United States Supreme Court, to the effect that a State court could not, until final judgment in a suit issue an attachment or an injunction against a national bank.

The late New York legislature adopted some peculiar laws; but one which recently went into effect is something unique. It bears the modest title of "an act for the prevention of blindness," and the means by which blindness is to be prevented are so admirably simple. The law reads: "Should any midwife or nurse having charge of any infant in this State, notice that one or both eyes of such infant are inflamed or reddened at any time within two weeks after its birth, it shall be the duty of such midwife or nurse so having charge of

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such infant to report the fact in writing, within six hours, to the health officer or some legally qualified practitioner of medicine of the city, town or district in which the parents of the infant reside." A following section prescribes the punishment for failure to comply with its provisions. It is a well known fact in natural history that babies, even under the age of two weeks, will cry, and that any protracted crying spell has a tendency to redden the eyes of the child. The law, therefore, may be supposed to mean that no infant under two weeks of age shall cry for any considerable time without the permission of the Health Board, or at least without the sending of notice to the health authorities. If the act should be strictly enforced, and all the nurses of all the crying infants should report to the President of the Board of Health, the majesty of the law would be vindicated, and, in some inscrutable way, blindness would doubtless be prevented. The law has, however, another aspect to which attention should be called. There is no punishment for the father, mother, aunt, grandmother or other relative or friend of the infant who may notice the suspicious redness of the eyes, and who fails to bring the matter to the attention of the health officials. It is only the nurse or midwife who is required, under penalty, to report the facts in writing, and not every nurse, but only the one who may "notice" the facts which are considered important. The result of its enforcement, therefore, may not be the prevention of blindness among infants, but the increase of blindness among nurses. The nurse has simply to refuse to notice, and she may at once evade all the pains and penalties of the law.

The courts will soon have an opportunity to construe the anti-trust law recently passed by congress, an action having been begun under that act in the United States Circuit Court at Nashville, Tennessee. The bill filed in the case charges that the coal companies doing business in Nashville and the dealers who sell the product of the mines to the people of the city, have formed a combination or trust in order to fix the prices of coal for the local market, and thereby control the trade; that the trust has fixed the rates to be charged for coal sold there; that the dealers have pledged themselves not to purchase coal from any

mining company not a member of the coal exchange, and that the mining companies will not sell to any local dealer who is not a member of the combination. It is charged that the price of coal at the mines is fixed; that the local dealers are allowed a certain margin, and that any advance in excess of the total amount allowed the miners and dealers, with the freight added, is divided between them. An injunction was asked for under the law. It is unnecessary to say that interest in the progress and final outcome of this case will not be confined to the locality in which the suit is brought.

NOTES OF RECENT DECISIONS.

COVENANT—NOT TO ENGAGE IN TRADE—BREACH—INJUNCTION.—An interesting question, upon the facts, as to the violation of a covenant not to engage in a business came before the Supreme Court of Kansas in *Richardson v. Emmert*, 24 Pac. Rep. 478. There it appears that Miss E purchased of Mrs. R a millinery business in the city of Ft. Scott, and Mrs. R covenanted in writing that she would "never enter into, or be interested in any manner in, the millinery business in that city." Prior to the purchase by Miss E, Mrs. R had carried on the millinery business in Ft. Scott for 10 years. During that time she had built up a large trade. After Miss E had made the purchase, she took possession of the store, and carried on the business at the old place; Mrs. R having transferred to her the lease of the store-room. After the purchase by Miss E, Mrs. R and her husband left the country, and went to Ireland. Soon afterwards they returned to Ft. Scott. The husband sold the homestead, the title of which was in his name; and, with the money so obtained, they commenced to carry on the millinery business in Ft. Scott in the name of the husband, Mr. R, but Mrs. R had the principal supervision of it. She bought the millinery they offered for sale. An advertisement was placed in the city paper notifying the public of Mrs. R's display of millinery and inviting the ladies of the city to call and see her goods. It was held that the opening up and carrying on of the millinery business in the name of Mr. R, the husband of which

business Mrs. R had the principal supervision was a violation by Mrs. R of her covenant and she could be restrained by injunction. Horton, C. J. says:

The contention is that Mrs. Richardson, since the sale of her stock of millinery goods to Miss Emmert, has never entered into, or become interested in any manner in, the millinery business in the city of Ft. Scott; that she is simply aiding her husband in the conduct of his business; and that the assistance rendered by her to her husband is not a violation of the letter or spirit of her contract with Miss Emmert. As the trial court granted the injunction prayed for, and rendered a judgment for costs against Mrs. Richardson, the general finding of the trial court is against her. We must assume that, if the evidence and inferences establish that Mrs. Richardson has violated her contract, the judgment must be sustained. That such contracts as were entered into between Mrs. Richardson and Miss Emmert are valid. See *Roller v. Ott*, 14 Kan. 609. All contracts of this kind are to some extent against public policy, and their provisions are not to be extended by construction or implication. *Id.* There is sufficient in the evidence, in view of the general finding of the trial court, to show that Mrs. Richardson, after her sale of her stock of millinery goods, entered into, and again became interested in, the millinery business in Ft. Scott, in violation of her contract. The business, evidently, is carried on for the joint benefit of Mr. and Mrs. Richardson, but under her supervision. The husband furnished the money in the business from the sale of the homestead of the parties, the title of which was in his name, and the store is operated in his name; yet it is carried on for the interest of the wife, as well as the husband. Both are interested. Under her contract, Mrs. Richardson cannot become interested in any millinery business in Ft. Scott, in competition or opposition to Miss Emmert. *Guerand v. Dandeleit*, 32 Md. 561.

It is claimed that the cases of *Harkinson's Appeal*, 78 Pa. St. 196, and *Tabor v. Blake*, 61 N. H. 83 are decisive against the judgment of the trial court. In the *Harkinson* case the mother sold a bakery, and covenanted that she would not engage in the same business, directly or indirectly, in the same place for 10 years. Within that time she established her son in the same business in the same place, advancing him money as she had done to her other children in their business. The trial court found as a fact that the business was carried on in good faith by the son, and not by the mother, and, as no actual damage was shown, an injunction was refused. *Mercur, J.*, in delivering the opinion in that case, said: "In the present case the appellant did not erect nor furnish the establishment with any intention that she would engage in the business, or be in any manner interested therein. In furtherance of her plan for aiding her children, she had substantially advanced to him his supposed share in her estate. It was invested in that particular for his benefit and not hers. The effect was the same as if she had given or loaned to him money, with a knowledge that he intended to so use it. It is certainly going very far to say that, by the general terms used in this agreement, a parent has covenanted to control the business of her son by withholding from him his share in her estate. * * * The appellant denies in her answer that she has encouraged and promoted the business of others with the intent and effect of injuring complainant. On the contrary, she alleges

and avers that she has advised and encouraged the old customers of her place to continue their custom, and has endeavored to remove objections on their part to purchasing of the appellee." That case is quite different from this. Mrs. Richardson has not advised or encouraged her old customers to continue their custom with Miss Emmert, nor has she endeavored to remove objections on their part from purchasing of Miss Emmert. Again, the mother in that case invested her money for the particular benefit of her son, and not for herself. In this case Mrs. Richardson does not obtain wages or pay for her services; but, in carrying on the business the fair inference from the evidence is that she is interested in the business the same as her husband. Both get the benefit. In the Tabor case, Blake agreed that "he would not open or cause to be opened, a grocery, a billiard or an eating saloon for trade in the village of Woodsville." Subsequently, Mrs. Blake, his wife, opened an eating saloon in the village, and her husband acted as her agent in carrying it on. The finding of the court was that the business belonged to the wife, and that, as the husband conducted the business in good faith as her agent, he did not violate his agreement. The findings of fact in that case were in favor of the party who had covenanted not to again engage in business, but in this case the finding is against such party. In many respects the cases are similar, but yet the facts are somewhat different. With the finding of the court against Mrs. Richardson, which is sustained by the evidence, we think it cannot be said, as in the Tabor case, that the defendant has not violated her contract.

CONSTITUTIONAL LAW — MUNICIPAL ORDINANCE—CONTRACT—EIGHT HOURS' LABOR.—The Supreme Court of California, in *Ex parte Kubach*, hold that an ordinance which provides that "eight hours' labor constitutes a legal day's work," where the same is performed under a contract with the city, and that any one engaged in performing such a contract who "shall demand, receive or contract for more than eight hours' labor in one day," from any person, or who shall employ Chinese labor, shall be guilty of a misdemeanor, and shall be subject to a fine, is unconstitutional and void. The court said:

It is simply an attempt to prevent certain parties from employing others in a lawful business and paying them for their services, and is a direct infringement of the right of such persons to make and enforce their contracts. If the services to be performed were unlawful or against public policy, or the employment were such as might be unfit for certain persons, as for example, females or infants, the ordinance might be upheld as a sanitary or police regulation, but we cannot conceive of any theory upon which a city could be justified in making it a misdemeanor for one of its citizens to contract with another for services to be rendered because the contract is that he shall work more than a limited number of hours per day. Mr. Cooley, in his work on Constitutional Limitations says: "The general rule undoubtedly is, that any person is at liberty to pursue any lawful calling, and to do so in his own way, not encroaching upon the rights of others. This general right cannot be taken away

It is not competent therefore to forbid any person, or class of persons, whether citizens or resident aliens, offering their services in lawful business, or to subject others to penalties for employing them. But here, as elsewhere, it is proper to recognize distinctions that exist in the nature of things, and under some circumstances to inhibit employments to some one class by leaving them open to others. Some employments, for example, may be admissible for males and improper for females, and regulations recognizing the impropriety and forbidding women engaging in them would be open to no reasonable objection. The same is true of young children, whose employment in mines and manufactories is commonly, and ought always to be regulated. And some employments, in which integrity is of vital importance, it may be proper to treat as privileges merely, and to refuse the license to follow them to any who are not reputable." 5th ed., p. 745. For these reasons we hold the ordinance, so far as it attempts to create a criminal offense, to be void, and that the petitioner should be discharged.

SLANDER—WORDS SPOKEN BY A CATHOLIC PRIEST—SPECIAL DAMAGE.—The Supreme Court of Massachusetts, in *Morassee v. Brochu*, 25 N. E. Rep. 74, consider an interesting question on the subject of slander, holding that it is a sufficient averment of special damage suffered by a physician by words spoken by a priest to his church, that members of the church and other persons have refused to employ him in his profession, whereby he has been deprived of the profits thereof, without specifying the names of the persons who have refused to employ him. That an action will lie for damages resulting from words spoken falsely with intent to injure plaintiff in his profession, though the words were not defamatory, if the injury was the natural and probable result of the speaking of the words. That words spoken by a Catholic priest to his church, falsely and with intent to injure plaintiff in his profession, instructing them not merely that a second marriage, occurring under such circumstances as plaintiff's did, excommunicated him from the Catholic Church, but that such marriage and excommunication should debar plaintiff from being employed by them, and that they could not have the ministrations of the priest in their sickness while he was under their roof, are actionable *per se* as touching the plaintiff in his profession, though they do not impute professional misconduct or incapacity. Allen, J., says:

But even if the averment of special damages is to be regarded as insufficient, for want of naming the persons who would not employ the plaintiff as a physician, the question remains whether the words are actionable *per se*, as containing a defamatory imputation upon the plaintiff, or, rather, whether there was

enough in them to warrant the judge in submitting them to the jury. Words are to be held actionable *per se* which convey an imputation upon one in the way of his profession or occupation, and in such case there need be no averment of special damages. The old phraseology of Comyn's Digest, which has often been followed or repeated, is that "words not actionable in themselves are not actionable when spoken of one in an office, profession or trade, unless they touch him in his office." And many cases turn upon the question whether words spoken of one, who has a particular profession or trade, touch him in it; that is, whether they have such a close reference to such profession or trade that it can be said they are defamatory by means of an imputation upon him in that character, as, *e. g.*, an imputation upon him as a clergyman, a physician, or a tradesman, distinctly and independently of being an imputation upon him as an individual. Some of the cases have gone very far to negative such a construction. Thus, for example, it was said by Bayley, B., in *Lumby v. Allday*, 1 Crompt. & J. 301 (1831), that it was his opinion, for the time being, that the words must go to the length "of showing the want of some necessary qualification, or some misconduct, in the office." And in *Ayre v. Craven*, 2 Adol. & E. 2, words imputing adultery to a physician were not held actionable *per se* and without special damage, there being nothing to show that the adultery was committed by him while acting as a physician, or in connection with his medical practice. These two cases are perhaps the most striking of any in that direction. But see, also, *Pemberton v. Colls*, 10 Q. B. 461, and *Gallwey v. Marshall*, 9 Exch. 294, for instances where imputations upon clergymen were held not to reflect upon them in their profession. The case of *Ayre v. Craven* has not escaped criticism and comment, both from the bar and bench, though, perhaps, it has never been overruled. In *Hopwood v. Thorn*, 8 C. B. 293, Cockburn and E. James said in argument: "*Ayre v. Craven* has confessedly gone to the very verge of absurdity." In *Gallwey v. Marshall*, 9 Exch. 294, Willes said, in argument: "The case of *Ayre v. Craven*, is an extreme case." To which Alderson, B., replied from the bench: "There are certain professions, the proper exercise of which depends on morality; and, except for the case of *Ayre v. Craven*, I should have thought that that of a physician was one of them." Page 297. It may well be suggested that the doctrine of that and kindred cases has a distinct tendency to lower the estimation in which clergymen and physicians are naturally and properly held. At any rate, they do not correctly represent the law of Massachusetts. In *Chaddock v. Briggs*, 13 Mass. 248, which was decided when drunkenness was not a crime in Massachusetts, and when the habits in respect to drinking intoxicating liquors were freer than at present, it was held that to charge a clergyman with a single act of drunkenness was actionable *per se*. The decision of course rested on the ground that it injured him in his profession, the court saying, "a pure and even unsuspected moral character being necessary to their usefulness in the community." That case has never since been questioned in this State, and it is inconsistent with the general doctrine that the words must impute either ignorance or want of skill, or some misconduct while actually performing the duties or functions of the profession or office. In the present case it must now be assumed that the jury found, under the instructions which were given to them, that the defendant, falsely, and with a deliberate purpose and intent of injuring the plaintiff in his profession,

and for the purpose of gratifying his ill will towards the plaintiff, spoke the words in question. These words did not merely instruct the congregation that the effect of a second marriage, under the circumstances which existed, was to excommunicate the plaintiff from the Catholic Church, but they proceeded to impute against the plaintiff that such marriage, or such excommunication, should debar him from being employed as a physician in the parish, and that patients who employed the plaintiff as a physician could not in their sickness have the ministrations of the defendant as their priest. The question is, does this imputation effect him, or, in the words of Comyn, touch him in his capacity as a physician? It seems to be palpable straining of language to say that it does not. It imports not only that the plaintiff was not in himself a suitable person for a Catholic community to employ as a physician, but that if employed, the patient must lose the attendance of a priest. But the jury might well find that the plaintiff was a suitable person to be employed there as a physician, notwithstanding his marriage and its ecclesiastical consequence. The defendant assumed to stand in a position of authority. By virtue of this position he was able to exert a special influence upon his people. He assumed to assert and to exercise, this influence, and his words amounted, in the opinion of the jury, to a plain departure from the proper exercise of such influence, and virtually to an instruction that the plaintiff was an unsuitable and improper person to be employed as a physician, and a direction not to employ him, on pain of losing caste in the church, and of losing the benefit of his ministrations as priest if they should be sick. The words were also susceptible of the meaning that the plaintiff was an unfit man even to be met socially, and that the defendant would not sit at the same table with him. Under these circumstances the court cannot lay down a rule that the words did not touch the plaintiff in his profession. According to the verdict of the jury, they were designed to touch him, and did touch him, effectually in his profession. The language of *Parke, B.*, in *Southey v. Denny*, 1 Exch. 196, 202, 203, supports this view. In the opinion of a majority of the court the words might therefore properly be found by the jury to have been spoken of the plaintiff in respect to his profession as a physician, and they might properly be found to be defamatory and actionable without an averment of special damages. See as supporting this result, *Sanderson v. Caldwell*, 45 N. Y. 398, 405, where the court formulates a rule which would include this case.

IS A TRUST DEED TO SECURE THE REPAYMENT OF MONEY A MORTGAGE?

This is a question which frequently arises, and we therefore propose to give a short resume of the history and law of mortgages, showing their most important incidents and essentials, and then to consider trust deeds, and show the distinctions which exist between them, and explain the different circumstances which might make it advisable for the conveyancer to adopt one form of deed or the

other. The subject, however, is such a fruitful one, that an exhaustive essay upon it would require several volumes.

Originally (in the reign of Henry II.) there were two modes of pledging lands; the first was called *vidum vadium*, or living pledge, and was a conveyance of lands by a debtor to his creditors, to hold until the rents and profits should amount to the sum borrowed, in which case the pledge was said to be living, for on discharge of the debt it returned to the borrower. The second was called *mortium vadium* in Latin, and *mort gage* in French. It contained a proviso for redemption, and was similar to the one in use at the present time.

"It was called a mortgage, because it is doubtful whether the mortgagor will pay at the time limited; and if he does not pay the land is taken from him forever, and so dead to him upon a condition."¹

"A mortgage may be described as a conveyance of real estate—as a pledge for the repayment of money borrowed, with a proviso that the deed shall be void on payment of the money with interest on a certain day."²

Upon the execution of the mortgage the legal estate of freehold in inheritance becomes immediately vested in the mortgagee, and the mortgagor usually becomes tenant at will of the mortgagee, who may enter into possession, unless prevented by the express terms of the contract; and where the interest is not paid the mortgagee becomes entitled to possession and to the rents and profits, and may bring an ejectment against the mortgagor, and recover the rents from the tenants.

The law was that if the money was not paid by noon on the day named in the deed, the lands were absolutely forfeited, nor would any subsequent tender of the money avail the debtor.³

The court of chancery, however, afterwards resolved that a condition of this kind was in the nature of a penalty, against which equity ought to relieve, and that all the mortgagee was in conscience and justice entitled to was his principal, interest and costs. The court determined, by an equitable and liberal construction, to mitigate the rigor of the common law, and it was therefore held that if the debtor paid the money borrowed within a rea-

sonable time, he should be entitled to call on the creditor for a reconveyance.

This right acquired the name of an equity of redemption, and in the reign of Charles I. the court had established a redemption not only against the tenant in dower and all those who claimed under the mortgagee, but also against all others who came in "in the past,"⁴ and at the present time mortgaged property may be redeemed at any time before foreclosure or sale, until the expiration of the period prescribed by the statute of limitation; and it must be remembered the statute does not run against the party out of possession.

The title of the mortgagee has never been a mere lien depending upon possession, but a real interest though conditional;⁵ and the mortgagee's interest is a trust estate. When the debt is discharged there is a resulting trust for the mortgagor, and the mortgagee is in equity simply a trustee of the legal estate for him.⁶

An equity of redemption may be aliened, entailed and devised by will, in the same manner as a trust estate. It is also descendible to the heir of the mortgagor. It may be mortgaged, but a security of this kind, commonly called a second mortgage, can seldom be recommended.

1st. In England, because a third mortgagee without notice may by tacking, that is to say, by taking a transfer to himself of the first mortgage, and acquiring the legal estate acquire a preference over the second mortgage.

In America, however, tacking is never allowed, because registration is constructive notice of the first mortgage, and regulates priority.

2d. Because a second mortgagee has no legal remedy, and is driven to the tedious and expensive process of a suit in equity to recover his principal and interest.

The equity of redemption attaches to every mortgage; every conveyance for the purpose of securing money is a mortgage,⁷ the evidence being usually the proviso for redemption whatever the form of the deed;⁸ and the equity being inseparably incident to a mortgage, cannot be limited or restrained by an

⁴ Emanuel Coll v. Evans, 1 Charles Rep. 10.

⁵ Barnard v. Eaton, 2 Cush. 304.

⁶ Evans v. Merrikin, 5 Gill. & J. 47.

⁷ Willard's Equity, 430; Powell's Mortgages, pp 9 10.

⁸ Bloom v. Rensselaer, 15 Ill., 505.

¹ Littleton.

² Collwell v. Woods, 3 Watts. 188.

³ Goodall's Case, 5 Rep. 95.

clause or agreement whatever, the maxim being once a mortgage always a mortgage.⁹

The court of chancery, having thus protected the mortgagor, gave the mortgagee the right, at a reasonable time after forfeiture, to call on the mortgagor to pay the money, or else be forever foreclosed from any further equity of redemption; and a suit in equity may therefore be brought for foreclosure at any time after forfeiture. The insertion of a power of sale in those States where such powers may be given, obviates the necessity of a suit; but in the following States no such power can be given in a mortgage or trust deed: Illinois, Iowa, Kansas, Kentucky, Louisiana, Nebraska, Nevada, and in several other States, there are statutory provisions regulating sales under powers in mortgages and trust deeds. As to whether the proviso for redemption imports a covenant to pay, so that the mortgagee has a personal remedy as well as his remedy against the land, we need not now discuss, as in almost all the States mortgage deeds contain covenants for payment, or separate obligations are taken either by bond or promissory note, and it is clear that the absence of any express obligation to pay the money will not make the instrument less effectual as a mortgage.

And now we come to the consideration of trust deeds for securing money, as distinct from absolute deeds of trust. A deed of trust to secure a debt is in legal effect a mortgage.¹⁰ The courts have always held that a conveyance to a trustee, with power of sale to pay a debt from the proceeds, and deliver the balance to the grantor upon his failure to pay the debt is a mortgage, and takes effect only from registration.¹¹ The addition of a power of sale does not change the character of the deed.¹² Both mortgages and trust deeds con-

vey defeasible titles only,¹³ and the right to redeem is the same, and is as broad in one as in the other;¹⁴ the only important difference being, that in the one case the conveyance is directly to the creditor, and in the other it is to a third person for his benefit. They are the same in the following essential particulars: 1. They are both intended as securities, and are in a legal sense mortgages. 2. In both, if not controlled by statute, the legal estate passes from the grantor; but in equity he is before foreclosure the actual owner. 3. In both the grantor has an equity of redemption, which can only be barred by a valid execution of the powers of sale, or by judicial decree. But where the creditor is himself the trustee, he cannot buy at his own sale without the aid of an enabling statute, otherwise, where the trust is confided to a third person.¹⁵ A deed of trust is often preferred to a mortgage on account of the intervention of a disinterested person as trustee. Lord Eldon considered it objectionable that the "mortgagee should himself be made the trustee to sell under the power;" in other words, he objected to investing the mortgagee, where power of sale was confided to him, with the character of trustee in a case where he was not free to act for the exclusive benefit of his *cestui que trust*, for he is first a trustee for himself, and second as to the residue for the mortgagor.¹⁶ Sometimes the intervention of a trustee is a serious inconvenience, because the trustee is usually nominated by the mortgagee, and he may without becoming hostile to the mortgagor, subject him to much trouble; but it is evident that trust deeds with power of sale afford to the creditor an easy, cheap and speedy remedy (even during his absence abroad), and enable him to avoid the vexatious delay, expense and inconvenience of a foreclosure in court and a sale under a decree. They have become the favorite mode of security in most of the States of the Union, and in some States, as in Colorado, mortgages are almost disused. The trustee is the agent of both parties, and is the holder of the legal estate,¹⁷ and he should therefore have no per-

⁹ Story, Eq. Jur. 1019.

¹⁰ Sir. H. Spellman's Works by Bishop Gilson, p. 234; 4 Kent's Com. 136; Magee v. Carpenter, 4 Ala., 469; Wolfe v. Dowell, 13 So. & Mas. 103; Smith v. Doe, 26 Miss., 291; Woodruff v. Robb, 19 Ohio 212; Crosby v. Huston, 1 Tex., 239 *et seq.*; McGreyn v. Hall, 3 Stew. & Porter, 597; Drake v. Root, 11 Colo. Reports 685.

¹¹ Sargent v. Howe, 21 Ill., 149; Fanning v. Kerr, 7 Iowa, 450; Fanning v. Kerr, 8 Iowa, 404; Woodruff v. Robb, 19 Ohio, 212; 2 Sumn. 533; Story's Eq. § 1067; Collwell v. Long, 20 Ohio, 464, 478; Wilcox v. Morris, 1 Murp. (N. C.) 116; 2 Dev. Eq. 555; 1 Wis. 529; 5 Ark., 321; 2 Texas, 1; Bennett v. Union Bank, Humph. 612; Gutbrie v. Cole, 10 Wr. 331; Fredericks v. Corcoran, 2 Colo. Reporter, 565.

¹² De Wolf v. Sprague Manuf'g Co., 49 Conn. 283;

Eaton v. Whiting, 3 Pick. 584; Bennett v. Union Bank, 5 Humph. 612.

¹³ Taylor v. King, 6 Murp. 358, and other cases.

¹⁴ Bloom v. Rensselaer, 15 Ill. 505.

¹⁵ Bloom v. Rensselaer, 15 Ill. 506.

¹⁶ 4 Kent's Com. 146, n.

¹⁷ Anderson v. Hollman, 1 Jones (Law), 169; 7 Ired.

sonal interest, and should not be connected with the beneficiaries by any ties of relationship or personal friendship.¹⁸ It has, however, been held that a mortgage until forfeiture should be regarded as security merely, which confers upon the mortgagee no right of entry.¹⁹ And the Colorado Supreme Court has expressed an inclination to this opinion,²⁰ and there is no doubt but that this is a result to be expected from modern progress, and the wide sweeping abolitions in modern times of the distinction between law and equity.

HENRY J. SWAN.

Denver, Colorado.

Eq. 418; Sargent v. Howe, 21 Ill. 148; Hannah v. Carrington, 18 Ark. 85, 8 Ala., 694; Cook & Sargent v. Dillon, 9 Iowa, 407.

¹⁸ Long v. Long, 79 Mo. 644.

¹⁹ 3 Wash. Real Property, 99 *et seq.*

²⁰ Drake v. Root, 11 Colo. Reporter, 685.

CHATTEL MORTGAGE—NOTICE—RIGHT OF POSSESSION.

BROWN V. JAMES H. CAMPBELL CO.

Supreme Court of Kansas, July 3, 1890.

1. *Chattel Mortgage—Notice.*—Where a chattel mortgage is duly executed and placed on file in the office of the register of deeds, it is notice to all the world for the period of one year, unless it is sooner satisfied; and will be notice for each succeeding year, if not satisfied, provided the renewal affidavit be filed in due time.

2. *Mortgagee—Right of Possession.*—Where there are no stipulations to the contrary, the mortgagee is the owner of the mortgaged property, and has the right to the possession thereof from the execution of the mortgage until it is satisfied or ceases to have validity, whether the debt is due or not.

3. *Removal of the Property by Mortgagee's Agent—Sale by Commission Merchant—Conversion.*—A commission merchant receiving mortgaged property from the mortgagee's agent, and selling the same in due course of trade, is liable to the mortgagee for a conversion of the property, though the sale was made in good faith and without actual notice.

VALENTINE, J.: This was an action brought in the district court of Wyandotte county by George W. Brown, and C. W. Brown, partners as Brown Bros., against the James H. Campbell Company, a corporation and a live-stock commission merchant, to recover from the defendant the sum of \$1,400, with interest for the alleged conversion of 45 head of neat cattle belonging to the plaintiffs as mortgagees. A trial was had before the court and a jury, and judgment was rendered in favor of the defendant; and the plaintiffs, as plaintiffs in error, bring the case to this court for review.

The principal facts of the case are substantially as follows: On September 27, 1888, C. J. Blanchard, who resided in Cowley county, and who owned and possessed the cattle above mentioned, in that county mortgaged the same, along with some other personal property, to the plaintiffs. The mortgage was executed to secure a debt of \$2,050, \$600 of the same to become due in 30 days and the remainder thereof, \$1,450 to become due in 90 days. The mortgage was deposited in the office of the register of deeds on the next day, to-wit, September 28, 1888. There was no stipulation in the mortgage as to who should have the legal title or the possession of the mortgaged property, but the mortgagor was permitted to retain the possession thereof. The mortgaged property was not to be removed from Cowley county. The mortgage debt has never been paid. On February 12, 1889, without the consent or knowledge of the plaintiffs, the cattle were transported by railroad from Cowley county to Kansas City, Wyandotte county, Kan., in the name of M. A. Blanchard. This M. A. Blanchard was Martha A. Blanchard, the wife of C. J. Blanchard the mortgagor. The cattle were consigned to, and placed in the possession of, the defendant, which, as aforesaid, is a corporation and a commission merchant or broker. On the next day the defendant, in the ordinary course of business, sold and delivered the cattle, in four different lots to different purchasers, received the proceeds of the sale, and paid the same, less commission, over to the consignor, M. A. Blanchard. All this was done without the consent or knowledge of the plaintiffs. The defendant at the time had no actual knowledge of the chattel mortgage nor any knowledge that any one except the consignor claimed to have any interest in the property. The case was tried in the court below upon the theory that the plaintiffs were negligent in not taking the possession of the cattle within a reasonable time after the mortgage debt became due, and that if the defendant sold the property, and paid over the proceeds to the consignor, innocently, without any knowledge of the plaintiff's claim, and only as a commission broker, it was not liable. For instance, the court gave, among others, the following instructions: "If the jury find from the evidence that said defendant did not purchase the cattle in controversy, and sell and dispose of the same, as its own, but that said cattle were shipped by M. A. Blanchard to the defendant as live-stock commission merchants, to be sold by said defendants as the agent for and on account of the said M. A. Blanchard, and the proceeds of said sale paid over by said defendant to the said M. A. Blanchard, in the ordinary course of business, without actual notice to said defendant of the rights or claim of said plaintiffs thereto, then said defendant is not guilty of a conversion of said cattle or their proceeds, and you will find for the defendant." "If the jury find from the evidence that the plaintiffs permitted the mortgaged property described in the

mortgage introduced in evidence in the case, to remain in the possession of the mortgagor for a considerable length of time after the conditions of the mortgage had been broken, and that by using reasonable diligence after default in the conditions of said mortgage, said plaintiffs could have obtained possession of said property, and subjected the same in payment of the debt secured thereby, then I instruct that it was the duty of said plaintiffs so to do within a reasonable time; and if the plaintiffs failed to so take possession of said property and subject it to the payment of said indebtedness, within a reasonable time after default in the conditions of said mortgage, they were guilty of negligence, and cannot recover in this action, unless you find that the defendant had actual notice of the plaintiffs' mortgage, in which case you will find for plaintiffs."

The statutes in this State do not, in express words, enact that a chattel mortgage shall in any case be valid, or shall in any case be notice to any person; but by the strongest of implications, we think, they enact that every chattel mortgage, duly and honestly executed, deposited in the office of the register of deeds, shall be valid, and shall be notice as to all the world for the period of one year, unless the mortgage debt is sooner satisfied, and shall remain valid and notice as to all the world for each succeeding year, provided the mortgage remains unsatisfied and provided a sufficient renewal affidavit is filed prior to the expiration of each succeeding year. Mortgage Act, §§ 9, 11. Our statutes also provide that, "In the absence of stipulations to the contrary, the mortgagee of personal property shall have the legal title thereto, and the right of possession." *Id.* § 15. In other words, where there are no stipulations to the contrary, the mortgagee is the owner of the mortgaged property, and has the right to the possession thereof from the execution of the mortgage until it is satisfied or ceases to have validity, whether the debt is due or not; and there are no stipulations to the contrary in the present mortgage. Our statutes also provide that when a chattel mortgage is satisfied, it shall be the duty of the holder thereof to enter satisfaction thereof of record, and, if he fails to do so within 30 days after demand therefor, he is liable to pay a penalty for his failure of \$100. *Id.* §§ 8, 16. It will therefore be seen that our statutes require that the existence of every chattel mortgage and whether it is still valid and in force or not, shall be shown by the records in the office of the register of deeds.

The defendant claims that it is not liable in this action, for several reasons, among which are the following:

It claims that it was not bound to take notice of the plaintiffs' mortgage, although it was duly deposited in the office of the register of deeds; and it cites the case of *Frizzell v. Rundle*, 12 S. W. Rep. 918 (decided by the Supreme Court of Tennessee in January, 1890), and also cites *Roach*

Turk, 9 Heisk. 708. This is certainly not the law in Kansas, for the implications of the statutes, and of all the decisions of this court, are certainly to the contrary, and that a chattel mortgage duly executed, and on file in the office of the register of deeds, is notice, as above stated, to all the world.

The defendant also claims that the plaintiffs were negligent in not taking the possession of the mortgaged property immediately after the mortgage debt became due, and that for this reason the mortgage ceased to operate, and became void; and it cites the following cases from Montana and Illinois, to-wit: *Travis v. McCormick*, 1 Mont. 148; *Reed v. Eames*, 19 Ill. 594; *Cass v. Perkins*, 23 Ill. 382; *Barbour v. White*, 37 Ill. 164; *Reese v. Mitchell*, 41 Ill. 365; *Hanford v. Obrecht*, 49 Ill. 146; *Wylder v. Crane*, 53 Ill. 490; *Lemen v. Robinson*, 59 Ill. 115; *Arnold v. Stock*, 81 Ill. 407; *Dunlap v. Callon*, 88 Ill. 82. This, we think, is also against the implications of our statutes, and against the views heretofore entertained by the entire bench and bar of this State, and is against the great weight of authority.

The defendant also claims that it is not liable for the reason that it was only a mere agent or servant of the consignor, transferring the property from the consignor to the purchaser, and asserted no right, title, or interest in or to the property with reference to itself; and it relies upon the cases heretofore and hereafter cited. Among its cases cited in support of this claim is the case of *Rogers v. Huie*, 2 Cal. 571, where it is held that an auctioneer selling stolen property in the regular course of his business, and paying over the proceeds to the felon, without notice that the goods were stolen, is not liable. This decision, we think, is against all authority, and is not good law. See *Mechem*, Ag. § 915, and cases there cited. The defendant also cites *Burditt v. Hunt*, 25 Me. 419, and *Leuthold v. Fairchild*, 35 Minn. 99, 100, 27 N. W. Rep. 503, 28 N. W. Rep. 218. These cases seem to enunciate the doctrine that a mere servant, agent, or carrier, who in good faith transports the goods from one place to another, or otherwise assists in disposing of the goods, without asserting or claiming any right, title, or interest in himself, or any right to transfer any right, title or interest in the property to another, is not liable. This may be correct; but, if so, then it will hardly apply to this case. A person can never be held liable for a conversion of personal property unless he claims or asserts some right, title, or interest in himself or in another adverse to the interest of the owner. The defendant also cites *Spooner v. Holmes*, 102 Mass. 503, which seems to decide that an innocent seller of certain stolen negotiable coupons payable to bearer, and which could be transferred by mere delivery, was not liable. For the purposes of this case, this may be admitted to be good law, but it does not apply to this case. The case of *Kimball v. Billings*, 55 Me. 147, seems, however, to enunciate a different doctrine. The defendant

also cites *Hathaway v. Brayman*, 42 N. Y. 322. In this case it was decided that a mortgagor of chattels, in possession, has a right before default to sell and deliver the mortgaged property subject to the mortgage. This, we think, is good law, provided the mortgagor sells the property in good faith, and without any intent to hinder, delay, or defraud his creditors and especially the owner of the mortgage debt. If the mortgagor, however, should sell the mortgaged property without reference to the mortgage debt, or with any intent to hinder, delay, or defraud the holder of the mortgage, he would commit a criminal offense; and the sale would, in all probability, be void. Gen St. 1889, pars. 2233, 2452.

The plaintiffs cite the following cases, among others, with regard to the rights of mortgagees of chattels where innocent parties, without the consent of the mortgagees, have interfered or intermeddled with the mortgaged property: *Coles v. Clark*, 3 Cush. 399; *Sprights v. Hawley*, 39 N. Y. 441; *Moloughney v. Hegeman*, 9 Abb. N. C. 403; *Marks v. Robinson*, 82 Ala. 69, 2 South. Rep. 292; *Poole v. Adkisson*, 1 Dana, 110; *Nichols v. Barnes*, 3 Dak. 148, 14 N. W. Rep. 110; *Phillip Best Brewing Co. v. Pillsbury, & Hurlbut Elevator Co.*, 5 Dak. 62, 37 N. W. Rep. 763; *White v. Phelps*, 12 N. H. 382. The plaintiffs also cite the following among other cases which have no particular relation to chattel mortgages, but which assert the general principles regarding the liability of persons who, as servants or agents of others, interfere or meddle with property not belonging to their master or principal: *Barnhart v. Ford*, 37 Kan. 520, 15 Pac. Rep. 542; *Kimball v. Billings*, 55 Me. 147; *Koch v. Branch*, 44 Mo. 542; *McCormick v. Stevenson*, 13 Neb. 70, 12 N. W. Rep. 828.

In the case of *Coles v. Clark*, *supra*, the syllabus reads as follows: "Where the mortgagor of goods, of which the mortgagee had the right of immediate possession by a mortgage duly recorded, induced the mortgagee, by false and fraudulent representations, to allow the goods to remain in his possession for a certain period, during which the mortgagor, for the purpose of cheating and defrauding the mortgagee, sent the goods to an auctioneer, by whom they were sold, and the proceeds paid over to the mortgagor, it was held that the mortgagee might maintain trover for the goods against the auctioneer, although the latter did not participate in the fraud of the mortgagor, and had no knowledge, in fact, of the existence of the mortgage." In the case of *Sprights v. Hawley*, *supra*, a portion of the syllabus reads as follows: "Where the mortgagor of chattels, in possession thereof, after default in the payment of the mortgage debt, fraudulently delivered them to a third person for sale, representing that they were his property, and the third person, as agent for the mortgagor, sells the chattels, such third person is liable to the mortgagee for the value thereof notwithstanding he acted in good faith, believing that the chattels were the property of

the mortgagor, and paid the proceeds of the sale, which he made, to the mortgagor, without reward for his services." In the case of *Marks v. Robinson*, *supra*, a portion of the syllabus reads as follows: "A factor or commission merchant receiving and selling cotton for a mortgagor, without actual notice of the mortgage, is liable in trover to the mortgagee if the mortgage has been properly recorded in the county in which the cotton was raised."

Mr. Jones, in his work on *Chattel Mortgages* (3d. ed. § 460), uses the following language: "An absolute sale of the mortgaged property by the mortgagor, or any one claiming under him, in exclusion of the rights of the mortgagee, is a conversion of it for which the mortgagee may maintain trover. This is upon the general principle that assuming to one's self the property and right of disposing of another's goods is a conversion. * * * If a mortgagor, for the purpose of defrauding the mortgagee, sends the mortgaged goods to an auctioneer, by whom they are sold, and the proceeds paid over to the mortgagor, the mortgagee may maintain trover for the goods against the auctioneer, although the latter did not participate in the fraud and had no knowledge of the existence of the mortgage. In such action the plaintiff need not show that the mortgagor is wholly irresponsible. An absolute sale of the mortgaged property by the mortgagor's assignee for the benefit of creditors, is a conversion, and he is liable to an action of trover by the mortgagee." Mr. Boone, in his work on *Mortgages* (section 260), uses the following language: "If a mortgagor of chattels, or any one claiming under him, sells the entire property, as owner, in exclusion of the rights of the mortgagee, such sale is a conversion of the chattels, and the mortgagee may maintain trover therefor." Mr. Mechem, in his work on *Agency* (section 915), uses the following language: "An auctioneer who receives and sells stolen property is liable to the true owner as for a conversion, although he acted in good faith, and received the property in the usual course of trade. So an auctioneer would undoubtedly be liable as for a conversion who, having received property for sale from not having authority to cause it to be sold, proceeded to sell it, or to pay over the proceeds, after notice of the rights of the true owner, and without his authority; and it has been held that an auctioneer who in good faith received and sold property for one whom he supposed to have the right to direct the sale, but who in fact had no such right, was guilty of a conversion." Judge Story, in his work on *Agency* (section 312), uses the following language; "A *fortiori*, if the principal is a wrong-doer, the agent however innocent in intention, who participates in his acts, is a wrong-doer also. Thus, if an auctioneer should be employed by a sheriff to sell goods at auction which he had unlawfully seized upon an execution, as if the goods did not belong to the execution debtor, the auctioneer who should sell would be liable to an action for the

tortious conversion equally with the sheriff. So, if the agent of a merchant who had received goods from a bankrupt after a secret act of bankruptcy should, pursuant to orders from his principal, sell the goods, an action of trover would lie in favor of the assignees against the agent, however ignorant he might be of a defect of title; for a person is guilty of a conversion who intermeddles with the property of another without due authority from the true owner, and is no answer that he acted as an agent, under the authority of a person supposed at the time to be entitled as the owner." Judge Cooley, in his work on Torts (star page 451), uses the following language: "One who buys property must, at his peril, ascertain the ownership; and, if he buys of one who has no authority to sell his taking possession in denial of the owner's rights is a conversion. The vendor is equally liable whether he sells the property as his own or as officer or agent, and so is the party for whom he acts, if he assists in or advises the sale. So it is no protection to one who has received property, and disposed of it in the usual course of trade, that he did so in good faith, and in the belief that the person from whom he took it was owner, if in fact the possession of the latter was tortious." Mr. Walt, in his work on Actions and Defenses (volume 6, p. 140), uses the following language: "Every person who aids or assists in the conversion of property, whether with knowledge of the facts, or in ignorance thereof, is responsible to the owner for all the damages sustained by him." In 4 Amer. & Eng. Enc. Law 108, the following language is used: "The action of trover is founded on the right of property and possession; and any act of a party, other than the owner, which militates against this conjoint right in law, is a conversion. It is not necessary for a manual taking to make conversion, nor that the party has applied it to his own use. The question is, does he exercise dominion over it in exclusion or in defiance of the owner's right? If he does, that is conversion, be it for his own or another's use. It is conversion if one takes the property of another, and sells, or otherwise disposes of it, without the owner's authority; or if he takes it for a temporary purpose only, in disregard of the owner's right, it is conversion. The word 'conversion,' by a long course of practice, has acquired a technical meaning and means detaining goods so as to deprive the owner, or person entitled to possession of them, of his dominion over them. Any carrying away of a chattel for the use of one without the owner's consent, or for a third party, amounts to a conversion, because it is inconsistent with the general right of dominion which the owner has in it, who is entitled to the use of it at all times and in all places. Such an asportation is conversion."

We think the defendant is liable. The mortgage was valid. It had been executed and deposited in the office of register of deeds less than one year prior to the sale. The defendant was bound to take notice of the mortgage, and of the

plaintiffs' rights thereunder; and in law the plaintiffs were the owners of the property, and had the absolute right to the possession and the control thereof. The defendant sold and delivered this property to different persons, not under the mortgage, or subject to the mortgage, but independent thereof, and as the absolute property of M. A. Blanchard, and attempted to give to the purchasers the absolute title thereto, and absolute control and dominion over the same. All this was in violation of the plaintiffs' rights, and rendered the defendant liable to the plaintiffs as for a conversion of the property. The judgment of the court below will be reversed, and cause remanded for a new trial. All the justices concurring.

NOTE.—1. Filing or Recording.—The several States have enacted laws for the filing or recording of chattel mortgages, which filing is constructive notice to all the world. What is a sufficient filing is a question on which there is a conflict of authority.¹

2. Right of Possession.—Where there are no stipulations to the contrary, the mortgagee is entitled to possession of the mortgaged property from the execution of the mortgage.²

3. Legal Title.—The doctrine of the principal case that the mortgagee is the owner of the property until the debt is satisfied, is the common law rule, and obtains in those jurisdictions where a chattel mortgage is considered a conditional sale with a defeasance, and upon default the absolute title vests in the mortgagee.³

But this doctrine is not accepted by all the courts. Thus, in Michigan a chattel mortgage is only a security for a debt, and the mortgagee has only an equitable lien on the property mortgaged, and the mortgagee must foreclose the mortgage, after default, before he can perfect his lien and become owner of the property.⁴ The same law prevails in the State of Washington, and no legal title can pass to the mortgagee, except by foreclosure and sale.⁵ Both North and South Dakota have adopted the rule that a chattel mortgage is only a security for a debt, and passes no legal title.⁶ A similar rule prevails in New Jersey. However, in this State, upon default the legal title vests in the mortgagee, but before condition broken he has only an equitable lien on the mortgaged property.⁷ A chattel mortgage is declared to be only a security for a debt by the Code of Georgia and of Texas.

¹ See *Marlet v. Hinman*, 31 Cent. L. J. 211 and note.

² *Mattison v. Baucus*, 1 N. Y. 295; *Hill v. Beebe*, 2 Kern (N. Y.), 565; *Pickard v. Low*, 15 Me. 48; *Bracket v. Bul-lard*, 12 Met. (Mass.) 319; *Ferguson v. Thomas*, 26 Me. 499; *Morrow v. Reed*, 30 Wis. 81; *Manson v. Ins. Co.*, 64 Wis. 28; *Leach v. Kimball*, 34 N. H. 568.

³ *Appleton Ins. Co. v. Bristol*, 46 Wis. 23; *Butler v. Miller*, 1 Den. (N. Y.) 407; *Summer v. Batchelder*, 30 Me. 39; *Thornton v. Gilmer*, 3 Sm. & M. (Miss.) 153; *Wood v. Dudley*, 8 Vt. 435; *Flanders v. Barstow*, 18 Me. 357; *Brad-law v. Tacker*, 1 Pick. (Mass.) 389; *Spriggs v. Camp*, 2 Spears (S. Car.), 61; *Charter v. Stevens*, 3 Den. (N. Y.) 33; *Bank v. Jones*, 4 N. Y. 49; *Hall v. Snowhill*, 2 Green (N. J.), 8.

⁴ *People v. Kimball*, 35 Mich. 28; *Lucking v. Wesson*, 25 Mich. 443.

⁵ *Byrd v. Forbes*, 3 Wash. St. 318.

⁶ *Grand Forks Nat. Bank v. Minneapolis Ele. Co.*, 48 N. W. Rep. 806.

⁷ *Woodside v. Adams*, 40 N. J. Eq. 417.

3. *Diligence in Taking Possession.*—The doctrine of the principal case that a chattel mortgage duly filed is notice to all the world for one year, though the debt matures in less time, is not the general rule. Thus, in Illinois, when the mortgage becomes due the mortgagee must take possession within a reasonable time thereafter,⁸ or he will lose his lien or right to it under the mortgage as against third persons.⁹ Where the parties reside in the same town or county, one day after default is a reasonable time within which to take possession of the mortgaged property;¹⁰ a delay of two days after default in such a case was held to be an unreasonable time for taking possession of the property.¹¹ Where notes payable in New York were secured by a chattel mortgage on property in Chicago, it was held that the agent of the mortgagee in Chicago had until the next day after being advised of the non-payment in due course of mail, to sue out a writ of replevin, provided the advice of non-payment was sent by mail without delay on the part of the person sending, and it was not necessary to resort to the telegraph in order to constitute diligence.¹² The Illinois statute is not substantially the same as the Kansas law, and provides that the mortgage shall be valid from the time it is filed for record until the maturity of the debt, provided such time shall not exceed two years.¹³ The same doctrine of the Illinois cases is the rule in Montana.¹⁴ The doctrine of the Colorado Supreme Court is in accord with these decisions, and a mortgagee must take possession of the property upon default. Upon breach of condition the title becomes absolute, and the mortgagee, to protect his rights as against creditors, subsequent purchasers and mortgagees, must take possession and treat the property as his own. After default the rights of interested parties are to be defined and determined by the principles which are applicable to the relations between vendors and creditors upon the sale of personal property. And in Colorado, to permit the mortgaged property to remain in the hands of the mortgagor, after default, is a fraud *per se*.¹⁵ The decision of the Colorado court is an able exposition of the principles underlying this subject.

4. *Sale of Mortgaged Property by Innocent Agent.*—Whether an innocent agent who sells mortgaged property is guilty of conversion, is a question on which there is a conflict of authority. The Tennessee Supreme Court holds that registration of a chattel mortgage is not notice thereof to an auctioneer who, in the regular course of business, sells the property and pays over the proceeds to the mortgagor; that, in the absence of actual notice, he is not liable to the mortgagee, because he does not assert any claim to the mortgaged property whatever. The constructive notice consequent upon registration attaches only to persons who subsequently assert any title, charge, or lien, or interest in the property described in the registered instrument, and only in favor of the grantees of such instrument.¹⁶ Conversion is the gist of the

action of trover, and conversion is a tort.¹⁷ When goods come into the possession of a person by delivery or by finding, he is not liable in trover for them without proof of a tortious act.¹⁸ So if the mortgagor of personal property makes an illegal sale to a third person, a servant of the purchaser, who merely carries the goods from one shop to the other, without any knowledge of the mortgage, or of any claim upon the property but those of the seller and purchaser, is not liable to the mortgagee in an action of trover.¹⁹ But if the servant should pawn the goods in his own name, he would be liable.²⁰ The Minnesota court holds the law to be that an agent or servant who, acting solely for his principal or master, and by his direction, and without knowing any wrong, or being guilty of gross negligence in not knowing of it, disposes of, or assists the master in disposing of, property which the latter has no right to dispose of, is not thereby rendered liable for a conversion of the property.²¹ And there are many cases which hold this doctrine.²² However, the numerical weight of authority is with the principal case, and holds that an auctioneer or commission merchant is liable in trover for selling mortgaged goods, though he sells them without actual notice of the mortgagee's title.²³

5. *Selling Mortgaged Grain.*—Another class of cases comes under this subject, where a grain buyer purchases mortgaged grain and sells it. Thus, in Nebraska it is held that a mortgagor of chattels, until foreclosure, possesses a beneficial interest in the property, and can convey a good title by a sale of such property to one who purchases in the open market in good faith without actual or constructive notice of it; that a chattel mortgage upon growing grain is not constructive notice to third parties of a mortgage on the same grain thereafter lawfully placed in a crib or bin; and a dealer in grain who, in good faith, in open market purchases such grain from the mortgagor, and receives it at his warehouse, will take it free from the lien of the mortgage.²⁴ In Dakota a grain buyer under similar circumstances would be held liable to the mortgagee in trover.²⁵

¹⁶ *Frizzle v. Rundle*, 12 S. W. Rep. 918; and see *Roach v. Turk*, 9 Helsk. (Tenn.) 708.

¹⁷ *Draper v. Fulkes*, Yel. 165; *Fuller v. Smith*, 3 Salk. 366.

¹⁸ *Mulgrave v. Ogden Co.*, Cro. Eliz. 219.

¹⁹ *Burditt v. Hunt*, 25 Me. 419.

²⁰ *Parker v. Godin*, 2 Strange, 813.

²¹ *Lenthold v. Fairchild*, 35 Minn. 100.

²² See 1 Pars. Cont. 520; *Moak's Underhill on Torts*, 575; *Parker v. Lombard*, 100 Mass. 405; *Spooner v. Holmes*, 102 Mass. 503; *Biglow on Torts*, 441, 449; *Rogers v. Hule*, 2 Cal. 571.

²³ *Perkins v. Smith*, 1 Wils. 328; *Stephens v. Elwell*, 4 Maule & S. 239; *McCombie v. Davies*, 6 East. 538; *Hoffman v. Carow*, 22 Wend. (N. Y.) 285; *Hills v. Snell*, 104 Mass. 173; *Williams v. Merle*, 11 Wend. (N. Y.) 80; *Saltus v. Saltus*, 20 Wend. (N. Y.) 266; *McGaldrick v. Willetts*, 52 N. Y. 612; *Pease v. Smith*, 61 N. Y. 477; *Pool v. Adkison*, 1 Dana, 110; *Coles v. Clark*, 3 Cush. (Mass.) 309; *Sprights v. Hawley*, 39 N. Y. 441; *Marks v. Robinson*, 82 Ala. 69; *Bristow v. Burt*, 7 Johns. (N. Y.) 254; *Doty v. Hawkins*, 6 N. H. 247; *Adamson v. James*, 4 Bing. 69; *White v. Splitgen*, 13 Mees. & Wes. 603; *Boone's Mont.* sec. 260; *Mechem's Agency*, sec. 215; *Story's Agency*, sec. 312; *Cooley's Torts*, 451*; *6 Walt's Act. & Defenses*, 140; *Yost v. Stout*, 4 Cold. (Tenn.) 205, overruled by *Roach v. Turk*, 9 Helsk. (Tenn.) 708.

²⁴ *Gillilan v. Kendall*, 28 Cent. L. J. 543 and note; 26 Neb. 82.

²⁵ *Philip Best Brew. Co. v. Pillsbury*, 5 Dak. 62; and see *Nichols v. Barnes*, 3 Dak. 145; *Duke v. Strickland*, 43 Ind. 494; *Hackleman v. Goodman*, 75 Ind. 202; *Rider*

⁸ *Reed v. Eames*, 19 Ill. 595; *Wooley v. Fry*, 30 Ill. 158.

⁹ *Reed v. Eames*, 19 Ill. 595; *Funk v. Staats*, 24 Ill. 633; *Arnold v. Stock*, 81 Ill. 407; *Dunlap v. Callon*, 88 Ill. 82; *Burnham v. Muller*, 61 Ill. 453; *Constant v. Mattison*, 22 Ill. 546; *Wylder v. Crane*, 53 Ill. 490.

¹⁰ *Buckley v. Lampett*, 24 Ill. 604.

¹¹ *Reese v. Mitchell*, 41 Ill. 365; *Cass v. Perkins*, 23 Ill. 382; *Wooley v. Fry*, 30 Ill. 158.

¹² *Barbour v. White*, 37 Ill. 164.

¹³ *Rev. Stat. ch. 95*, § 4.

¹⁴ *Travis v. McCormick*, 1 Mont. 148.

¹⁵ *Atchison v. Graham*, 23 Pac. Rep. 876.

6. *Landlord's Lien on the Grain Sold.*—The landlord's lien upon crops grown on the demised premises does not follow it into the hands of a *bona fide* purchaser without actual notice.²⁶ And this is the general rule.²⁷ But there are exceptions to this doctrine, which hold that the commission merchant is chargeable with notice of the landlord's lien.²⁸

7. *Lien of the Mortgage Follows the Purchase-money.*—In Oregon the lien of a chattel mortgage on growing crops follows the grain after severance and removal, and the money after sale.²⁹ But in Iowa the lien does not attach to the purchase-money.³⁰

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v. Edgar, 54 Cal. 127; Kimball v. Satterly, 55 Vt. 285; Howe v. Clark, 23 Ill. App. 145.

²⁶ Howe v. Clark, 23 Ill. App. 145.

²⁷ Nesbitt v. Bartlett, 14 Iowa, 485; Westmoreland v. Wooten, 51 Miss. 825; Scaff v. Stovell, 67 Ala. 237; Fowler v. Rapley, 13 Wall. (U. S.) 330; Beal v. White, 94 U. S. 382.

²⁸ Mathews v. Burk, 32 Tex. 419; Kennard v. Haney, 30 Ind. 37.

²⁹ Keel v. Levy, 24 Pac. Rep. 253.

³⁰ Waters v. Bank, 65 Iowa, 234.

CORRESPONDENCE.

IS A POLL TAX INHIBITED BY THE CONSTITUTION OF ILLINOIS?

From the adoption of our constitution in 1870 until the enactment in 1887 of the road law, applicable to counties not under township organization, and its amendment in 1889, there seems to have been no incentive for the profession to question or no opportunity for the courts to determine the constitutionality of a poll or capitation tax.

But since the enactment thereof there is presented a suitable occasion for the bar to moot and the courts to pass upon the limitations of our constitution upon the taxing power, and to determine whether or not such a tax is inhibited.

In arriving at a conclusion upon the constitutionality of a poll or capitation tax, we must examine the constitutional provision and construe it with reference to the prior constitution and ascertain what changes, if any, have been made, and if from such examination we find any alteration or addition we must apply the canon of construction that where a new law alters or omits any of the provisions of the old law, it is presumed to have been so done intentionally. After having ascertained the difference between the old and the new constitution, we must try and arrive at the intention of the people in making such alterations, and in doing, so have recourse to the provision itself and the language therein made use of, and if our mind should still remain in doubt to the proceedings of the convention which framed the constitution, and if therein the motive for the alteration is manifest, the aid, says Judge Cooley, in his work on Const. Lim., will be valuable and satisfactory.

Section one of article nine of the constitution of 1848 provided that the general assembly might, whenever they deemed it necessary, cause to be collected * * * a capitation tax of not less than fifty cents nor more than one dollar. By the second section of said article it was provided that the general assembly should provide for levying a tax by valuation so that every person or corporation should pay a tax in proportion to the value of his or her property.

In our present constitution, section one of said arti-

cle is entirely omitted, and section two, after being amended by striking out the word "for" after the word provide, and inserting in place thereof, "such revenue as may be needful by," becomes section one, and as it now stands, reads, that the general assembly shall provide such revenue as may be needful by levying a tax by valuation, so that each person or corporation shall pay a tax according to the value of his or its property.

Thus by comparing the revenue article of the two instruments, we find the former constitution is amended in that respect both by inserting a phrase and by eliminating an entire section. If we have recourse to the proceeding of the convention which framed the new constitution, we there find from the report of the revenue committee (Debates of Const. Com. 1870, vol. 2, p. 1197), that section one of article nine of the constitution of 1848 is omitted because it had remained a dead letter; that if it was provided for in the present constitution it would continue a dead letter; that there is no way to collect a poll tax so as to make it operate uniformly without the conferring of special privileges on the payment of the tax; that the collection of such a tax would necessarily produce inequality in its operation; that the true method of collecting a tax is by a tax on property according to its value, and that a poll tax is wrong in theory.

Hence it is self-evident that this section of the revenue article of the old constitution which provided for a poll tax is entirely omitted from our present revenue article, and that it was so omitted with the avowed intention of inhibiting the legislature from imposing such a tax.

It is equally plain that section two of article nine of the constitution of 1848 did not provide, or intend to provide, the entire revenue, but only required the legislature to provide for levying a tax by valuation, leaving them power to determine what amount should be levied on property, and what amount should be otherwise collected.

Where it is so amended in our present constitution as to provide for the entire revenue, requiring the legislature to provide "such revenue as may be needful, by levying a tax by valuation." The phrase "such revenue as may be needful by levying a tax by valuation," as used in section one, article nine, "such" being synonymous with any or all, provides for the entire revenue, and requires that it be collected by levying a tax by valuation, so that each person or corporation shall pay a tax according to the value of his, her or its property.

The whole tax being provided for, and a mode being pointed out for its being levied, excludes the collection of it in any other manner, because if part of it can be ignored by levying a part of the revenue by means of a poll tax, the whole of it can be ignored, and the entire revenue collected by a capitation tax.

Consequently, construing the constitution with reference to the intention of its framers, by the language made use of in the instrument itself, and in the light of the previous state of the law, we can come to no other conclusion than that a poll or capitation tax is inhibited.

JESSE E. BARTLEY.

Shawneetown, Ill., Oct. 13, 1890.

FLORIDA STATUTE OF LIMITATIONS IN MORTGAGE FORECLOSURE.

To the Editor of the Central Law Journal:

I notice in your journal of law, vol. 31, No. 16, page 313, after discussing the statute of limitations in regard to mortgages and mortgage notes, a member of

the Florida Bar advances the query: (See 31 Cent. L. J. 313.) I hold, without having any authorities to maintain my assertion, that where a mortgage foreclosed 20 years from the date of the execution thereof, and the property so mortgaged does not bring at sale the amount due for principal, interest, and the costs, charges and expenses of the suit, including the solicitor's fee provided for in the mortgage, that a judgment decree for the balance remaining due would be a valid judgment, and would run for the term of 20 years from the date of rendition of such judgment decree, provided, however, that complainant had execution issued and the sheriff make his return thereon every two years as the law requires.

I also am of the opinion that a mortgage note is not barred by the statute of limitations five years after maturity, for the mortgage is under seal, and the note being part of the mortgage, it would run for the term of the mortgage, and for twenty years after maturity, as does the mortgage.

W. FINLEY MAY.

Sanford, Fla.

RECENT PUBLICATIONS.

A TREATISE ON THE LAW OF SHERIFFS and other Ministerial Officers. By William L. Murfree, Sr. Second Edition. Revised by Eugene McQuillin, of the St. Louis Bar. The Gilbert Book Company, St. Louis, Mo. 1890.

THE DUTIES OF SHERIFFS, Coroners and Constables, with Practical Forms. By John G. Crocker, Counsellor-at-Law. The Third Edition, Revised and Enlarged. By James M. Kerr, Author of "Kerr on Business Corporations." Banks & Brothers. New York: Albany, N. Y. 1890.

These two recent works, or rather new editions of old works, made their appearance about the same time, and we shall take occasion to speak of them together. The work of Mr. Crocker, now edited by James M. Kerr, Esq., is undoubtedly of value, especially to the New York State lawyer, but we doubt very much whether to the general practitioner it contains as much of general value on the subject, as the more extensive work of Mr. Murfree. Murfree on Sheriffs, besides being a larger work and citing perhaps double the number of cases, has been prepared evidently for use in all the States, and, though the ability and diligence of the editor of Crocker on Sheriffs is not to be denied, one can see very readily from an examination of its pages that the principal aim was to state the law and practice of New York. It contains besides the text a very exhaustive citation of the statutes of that State on the different subjects, goes into the details as to the fees paid to sheriffs and coroners and constables, and contains also forms for the use of sheriffs, which, though of New York authority, may be found of some value to sheriffs in other localities acting under similar statutes. In this comparison we do not desire to underrate the value of Crocker on Sheriffs, for it is plain to be seen that the work has been carefully prepared and has positive merit. Murfree on Sheriffs is the production of a man eminent for his abilities as a writer and student of the law. As editor of the CENTRAL LAW JOURNAL for many years, those familiar with its pages will undoubtedly testify to his striking literary ability and his familiarity with current questions of the law. The first edition of his work met with the success it deserved, and filled a place in legal literature not theretofore occupied. The examination of the present edi-

tion by the side of the original will reveal the great mass of labor performed by Eugene McQuillin, Esq., who is the editor of the second edition. He has added to the original text a number of chapters which recent adjudications on the subject of sheriffs made necessary. In fact, 264 pages of new text have been added to the original work. He has also succeeded in incorporating in the notes more than 2,600 additional cases, besides numerous references to text books and statutes not cited in the original edition. The work is intended to be a compendium of the law now in force in each of the United States relating to sheriffs and their ministerial officers. It treats of the election of a sheriff, of his bonds and deputies, of process, of the right to arrest, of attachment, of attendance at court, of the incidents of and procedure on execution, of liens, of actions by and against the sheriff, of the succession and removal of sheriffs, of compensation, of the law of the constables and of the duty of sheriffs under criminal laws. It also contains an interesting chapter on United States marshals. The text is clear and concise, and the citations in the notes exhaustive. Mr. McQuillin, the editor, has succeeded in making a good book still more complete and thorough. The index is well prepared, and the mechanical execution of the work in every respect first-class.

THE AMERICAN AND ENGLISH ENCYCLOPEDIA OF LAW, Compiled under the Editorial Supervision of John Houston Merrill, Late Editor of the American and English Railroad Cases, and the American and English Corporation Cases. Vols. X and XI. Northport, Long Island, N. Y.: Edward Thompson Company, Law Publishers. 1890.

We took occasion upon the receipt of the first nine volumes of this series to speak of its merits and to outline its scope. It seemed clear to us then, as it does to us now, that the series has great value, especially to the practitioner who has not access to a complete law library. The thoroughness and accuracy with which the work was begun is still evident in these volumes. The aim seems to have been to group together all the cases obtainable upon the subjects presented, and to present the subjects exhaustively. It is impossible within the limits of this notice to call attention to the many subjects within these volumes, ably discussed, but we would single out, as especially worthy of mention, the subjects of implied trusts, improvement, indictment, infant, injunction, inns and innkeepers, insanity, insolvency, insurance, interstate commerce, intoxicating liquors, intoxication as a defense to contracts, jeopardy, joinder and joint tenants. In the case of some of these subjects it would be difficult to find them even referred to in any well-known text-book, and in the case of most of them the subjects are presented herein more exhaustively than in any existing text book. We keep these books before our editorial eye, and find ourselves constantly referring to them with profit in every instance. The books are handsomely printed, elegantly bound, and present an admirable appearance in the lawyer's book-case.

A GENERAL REVIEW OF THE CRIMINAL LAW OF ENGLAND. By Sir James FitzJames Stephen, K.C.S.I., D.C.L., Honorary Fellow of Trinity College, Cambridge; a corresponding member of the French Institute, a Judge of the Supreme Court, Queen's Bench Division. Second edition. London and New York: MacMillan & Co. 1890. The right of translation and reproduction is reserved.

A very entertaining work, especially to students and those who take interest in a history of the progress of English criminal law. Like everything that comes

from the pen of its learned author its style is admirable and its subjects are treated in a philosophic manner. The practitioner of this country at least will not find much of intrinsic value in its pages, and yet it is a work which criminal lawyers will find worth the reading. It contains a number of noted criminal trials.

BOOKS RECEIVED.

INTER-STATE EXTRADITION. By John G. Hawley. Detroit: John G. Hawley. 1890.

THE LAW OF COLLATERAL INHERITANCE, Legacy and Succession Taxes, Embracing the American and many English Decisions, with Forms for New York State, and an Appendix giving the Statutes of New York, Pennsylvania, Maryland and Connecticut. By Benj. F. Dos Passos, Assistant District Attorney New York County. New York: L. K. Strouse & Co., 63 Nassau street.

THE UNWRITTEN CONSTITUTION OF THE UNITED STATES, a Philosophical Inquiry into the Fundamentals of American Constitutional Law. By Christopher G. Tiedeman, A.M., LL.B., Professor of Law in the University of Missouri, Author of Treatises on "The Limitations of Police Power," "The Law of Real Property," and "Law of Commercial Paper." G. P. Putnam's Sons: New York, 27 West Twenty-third street; London, 27 King William street, Strand. The Knickerbocker Press. 1890.

RIGHTS, REMEDIES AND PRACTICE at Law, in Equity and under the Codes. A Treatise on American Law in Civil Causes, with a Digest of Illustrative Cases. By John D. Lawson, Author of Works on Presumptive Evidence, Expert Evidence, Carriers, Usages and Customs, Defenses to Crimes, etc. In seven volumes. Volume 7. San Francisco: Bancroft-Whitney Co. Law Publishers and Law Booksellers. 1890.

QUERIES.

QUERY No. 8.

A brings an action to set aside an execution sale of land. B, in answer, set up the defense that A, prior to institution of suit, had conveyed the land by deed to C. A, by way of confession and avoidance, admits the execution of deed to C, but states that no consideration passed for deed, and that C was to hold the land in trust for A. C is made a party plaintiff to the suit, and adopts the pleadings of A, and says what A has stated is true, and joins in prayer of A for his relief. On the trial defendant B introduces in evidence the deed from A to C. A in rebuttal puts in evidence his (A's) pleading, confessing and avoiding this plea, and C's pleading admitting the trust, disclaiming interest in suit, etc. Court held C's pleading not evidence. Did the court err? Give authorities.

S.

HUMORS OF THE LAW.

The prisoner had entered a plea of not guilty, but neither he nor his attorney had offered anything in his defense. When the jury brought in a verdict of guilty the court ordered the prisoner to stand up, saying: "Prisoner, have you anything to say before sentence is pronounced?"

The prisoner drew himself up to his full height, looked haughtily at the judge and compressed his lips tightly.

"As you have nothing to say," His Honor proceeded, "and as there are no mitigating circumstances, I shall impose the heaviest sentence the law allows. The sentence of the court is that you pay a

fine of six cents and costs and undergo an imprisonment in the Western Penitentiary for a term of twenty years."

The prisoner's face was a picture of conflicting emotions as he was led from the dock. He recovered sufficiently by the time his counsel approached him to say: "Blank blank you—'dignified silence' played hades, didn't it?"

WEEKLY DIGEST

OF ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions.

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1. ADVERSE POSSESSION.—The plaintiffs having been in the open, notorious, exclusive, continuous, adverse possession of the real estate in controversy for more than 10 years as owners, they thereby became vested of the absolute title to the premises.—*Peterson v. Townsend*, Neb., 46 N. W. Rep. 526.

2. APPEAL—Justification of Sureties.—The sureties in a bond given on appeal from a justice of the peace having failed to justify in five days after exception to their sufficiency, the superior court is without jurisdiction to extend the time in which they may justify or new sureties be given; Code Civil Proc. Cal. § 978, providing that unless they or other sureties justify in five days "the appeal must be regarded as if no such undertaking had been given."—*McCracken v. Superior Court*, Cal., 24 Pac. Rep. 845.

3. APPEAL—Married Women.—In an action against husband and wife for goods sold and delivered, the complaint contained a special count to enforce the liability of the wife's separate estate. A demurrer interposed by the wife having been sustained, plaintiffs declined to plead over as to her, and proceeded to take a personal judgment against the husband: Held, that this was not a waiver by plaintiffs of their right to appeal from judgment entered in favor of the wife.—*Ernst v. Hollis*, Ala., 8 South. Rep. 122.

4. APPEAL—Warehouse Commission.—No appeal lies to the district court from an order of the railroad and warehouse commission relating to the mode of operating a railway so as to promote the safety and convenience of the public. Objections to such an order can only be made by way of defense to an action brought to enforce it.—*Minneapolis & St. L. R. Co. v. Board of Railroad Commissioners*, Minn., 46 N. W. Rep. 559.

5. APPEALABLE ORDERS.—An interlocutory order of a purely administrative nature, made by a district court in the course of proceedings in insolvency pending before it, does not involve the merits of an action, nor does it affect a substantial right. Such an order is not

appealable.—*Brown v. Minnesota Thresher Manuf'g Co.*, Minn., 46 N. W. Rep. 560.

6. APPEARANCE.—In an action under sections 51 and 77 of the Code of Civil Procedure, where service was by publication, and the plaintiff's affidavit omitted to state that the defendants, or some of them, resided out of the State, *held*, that it was competent for the defendant to appear specially in support of a motion challenging the jurisdiction of the court, or to quash a judicial paper, without further appearing as a defendant in the case.—*Brown v. Rice*, Neb., 46 N. W. Rep. 489.

7. ASSIGNMENT FOR BENEFIT OF CREDITORS.—Bond.—Under Rev. St. Wis. §§ 1694, 1695, an indorsement of approval on the bond, by the officers taking it, was a condition precedent to the assignee's right to the property assigned as against creditors of the assignor, and where the bond was filed one day, the assignee garnished the next day, and the bond approved the following day, the property was held by the garnishment.—*Shakman v. Schlueter*, Wis., 46 N. W. Rep. 542.

8. ASSUMPSIT.—Pleading.—A complaint states a good cause of action which alleges that defendant's intestate, being engaged to marry plaintiff's daughter, requested plaintiff to make suitable preparations for "a betrothal reception" and "a wedding feast," and to purchase household goods "for both parties," and promised to repay plaintiff the money expended, which, in pursuance of the request, and reliance on the promise, plaintiff did expend for the purpose mentioned.—*Jaffe v. Lilienthal*, Cal., 24 Pac. Rep. 835.

9. ASSUMPSIT.—Pleading.—Plaintiff alleged that defendant made a note to him for a given sum, and, to secure it, executed a deed under Act Ga. Dec. 12, 1871, and acts amendatory thereof; that defendant had failed to pay the note or interest; and that plaintiff, to protect his security, had been obliged to pay taxes and insurance on the property, and also the amounts due a loan association that had a prior lien thereon; and he prayed judgment for the whole amount so expended in addition to the note and interest: *Held*, that the complaint stated a cause of action, and a demurrer thereto was properly overruled.—*Robinson v. Sutter*, Ga., 11 S. E. Rep. 587.

10. ATTORNEY.—Baratry.—Public Policy.—A contract by an attorney to pay a layman a third of his fee, if the layman procures the employment of the attorney by a litigant, is contrary to public policy, and void, under Code Civil Proc. Cal. § 287, subd. 4, declaring that an attorney may be removed or suspended for "lending his name to be used as attorney and counselor by another person who is not an attorney and counselor," as the effect of such a contract is to permit, by indirection, the use of an attorney's name by another not an attorney.—*Alpers v. Hunt*, Cal., 24 Pac. Rep. 846.

11. BASTARDY.—Offer of Compromise.—An offer of compromise made by defendant in a bastardy proceeding is not an admission of his guilt; and an instruction which permits the jury to consider the circumstances under which the offer was made, and the facts connected with it, in order to determine defendant's guilt or innocence, is erroneous.—*State v. Meyers*, Iowa, 46 N. W. Rep. 553.

12. BOUNDARIES.—Evidence.—Where the testimony as to the location of a boundary line is very conflicting, it is proper for the court to determine the boundary according to the evidence of a surveyor who has made an actual survey of the premises.—*Harrison v. Rowley*, Ky., 14 S. W. Rep. 539.

13. CHATTEL MORTGAGES.—Appeal.—The objection of the plaintiff, which sought to establish a lien upon certain personal property in the hands of D as the property of C, a judgment debtor of the plaintiff, was that, as to the property, it was only a general creditor of C, not having attached the same; and, the question not having been raised in the trial court: *Held*, that it would not be heard when raised for the first time in this court on appeal.—*South Omaha Nat. Bank v. Chase*, Neb., 46 N. W. Rep. 513.

14. CONSTITUTIONAL LAW.—Exemption from Taxation.—Under Const. Ky. art. 13, § 1, which provides that "no man or set of men are entitled to exclusive, separate public emoluments or privileges from the community but in consideration of public services," the legislature cannot exempt city water-works from State taxation without requiring any public service to the State as the consideration for such exemption, since water-works belong to a city in its private, and not in its municipal, capacity.—*Commonwealth v. MacKibben*, Ky., 14 S. W. Rep. 372.

15. CONSTITUTIONAL LAW.—Officers.—Under Const. Tex. art. 16, § 40, providing that "no person shall hold or exercise at the same time more than one civil office of emolument, except the justice of the peace, county commissioner, notary public, and postmaster," a person may hold either of the offices named, and at the same time any other office.—*Gaal v. Townsend*, Tex., 14 S. W. Rep. 355.

16. CONTRACTS.—Power of Attorney.—One who makes a contract with a person acting as special attorney is bound, at his peril, to ascertain the authority of such attorney, and its extent.—*Johnson v. Alabama G. F. & M. Co.*, Ala., 8 South. Rep. 101.

17. CONTRACT TO SELL LAND.—Lease.—Defendant executed a writing, reciting that he had leased certain land for the term of 10 years to complainant, on the latter's agreement to pay an annual rent, and stipulating that he would make complainant "a good and sufficient deed to said land as a free gift, without any charge or compensation from him," if the annual payments were made as provided: *Held*, that the contract was intended as a lease as long as it remained executory, and on completion of the payments was to become a perfected sale, the annual payments being the consideration therefor.—*Davis v. Robert*, Ala., 8 South. Rep. 114.

18. CORPORATIONS.—Contracts.—Plaintiffs in due form conveyed a tract of land to the defendant, W, who was then the president of the other defendant, a railway corporation. As part of the same transaction, W acknowledged in writing, under seal, that he held the land in trust for the corporation, to be used for certain purposes; and in the same writing contracted with the plaintiffs that he would reconvey the land to them if the corporation did not, within three years, take, use, and occupy the same, in whole or in part, for terminal purposes. The corporation was cognizant of the conveyance and contract, and assented to them: *Held* that, as between the parties, the deed and the concurrent contract must be considered and treated as one instrument.—*Chute v. Washburn*, Minn., 46 N. W. Rep. 555.

19. CORPORATIONS.—Increase of Stock.—*Held*, that the increase in stock having been made with the consent of all the stockholders was binding on them and the corporation, though there may have been irregularities in the proceedings.—*Bailey v. Champlain M. & P. Co.*, Wis., 46 N. W. Rep. 539.

20. CORPORATIONS.—Insolvency.—Claims.—A entered into an agreement with a corporation to serve it for a term of years, in consideration of which he was to receive a fixed salary. Before the expiration of his term of service, the corporation became insolvent, and a receiver was appointed for it, pursuant to the provisions of the act concerning corporations, approved April 7, 1875: *Held*: (1) That he is entitled to present a claim to the receiver for the amount of the damages he suffers by the breach. (2) That those damages are to be ascertained by an issue framed by a justice of the supreme court, and tried by a jury. (3) That such claim is not entitled to preference under section 63 of the act concerning corporations.—*Spader v. Mural Decoration Manuf'g Co.*, N. J., 20 Atl. Rep. 378.

21. COUNTIES.—Garnishment.—A county cannot be garnished for a debt due to a person not an officer of the county, as this process against counties is not expressly authorized by statute, and it would be against public policy to hold that it was authorized by implication.—*Dotterer v. Bowe*, Ga., 11 S. E. Rep. 896.

22. COVENANT—Running with the Land.—A covenant by a land-owner to render to the covenantees one-eighth of the lead ore raised by him on the land, in consideration of their constructing a "level" to drain off the water so that the ore may be reached, is a covenant that runs with the land.—*Crawford v. Witherbee*, Wis., 46 N. W. Rep. 545.

23. CRIMINAL LAW—False Pretenses.—A conviction under Code Ala. 1886, § 8811, for obtaining money under false pretenses, is not sustained by proof of a violation of section 8832, which punishes one who has been convicted of a misdemeanor for failure to perform a contract of service with his surety who has confessed judgment for fine and costs in his behalf.—*McQueen v. State*, Ala., 8 South. Rep. 115.

24. CRIMINAL LAW—Former Conviction.—A conviction for a simple larceny in a recorder's court is a bar to a subsequent prosecution in the city court for the taking of the same property, on the same occasion, from a dwelling-house, though the recorder's court did not have jurisdiction in a case of larceny from a dwelling-house.—*Powell v. State*, Ala., 8 South. Rep. 109.

25. CRIMINAL LAW—Homicide—Accomplice.—Evidence in a murder case that a coat belonging to deceased was found in defendant's possession is proper corroborative evidence, though the accomplice testified only as to the killing and not as to the taking of the coat. Though the coat was not found in defendant's possession until three months after the homicide, it was properly left to the jury to determine whether it was sufficient to corroborate the testimony of the accomplice.—*Malachi v. State*, Ala., 8 South. Rep. 104.

26. CRIMINAL LAW—Homicide—Where defendant seeks the difficulty with deceased for the purpose of chastising him for abusing defendant's father, and in pursuance of such purpose arms himself with a pistol to be used in case it becomes necessary, and does use it, and kills deceased therewith, pursuant to such purpose, defendant is guilty of murder, though it was necessary to use the pistol in order to save his own life.—*Gibson v. State*, Ala., 8 South. Rep. 98.

27. CRIMINAL LAW—Homicide—Self defense.—In a murder case defendant to avail himself of self-defense must have been free from fault in provoking or bringing on the difficulty which resulted in the killing. It is not enough that in the course of the difficulty it became necessary for defendant to kill deceased in order to save his own life or prevent great bodily harm.—*Kirby v. State*, Ala., 8 South. Rep. 110.

28. CRIMINAL LAW—Threatening Letters.—Under Rev. St. Wis. § 4380, it is an offense to send to ladies engaged in business a letter as follows: "If you do not leave this city inside of 10 days you will be tarred and feathered. Now, we 'mean' it. From the lovers of decent citizens. You are counted a nusants by all"—whether the letter be construed as conveying the threat of the sender or of other persons.—*State v. Comp-ton*, Wis., 46 N. W. Rep. 535.

29. CRIMINAL PRACTICE—Disqualification of Juror.—The fact that a juror disqualified in fact because not a freeholder, as required by Code Crim. Proc. art. 636, qualifies himself on his *voir dire*, and serves during the trial, is no ground for a new trial, though such disqualification did not come to the defendant's notice until after the verdict, and though he was not guilty of laches in not ascertaining the fact, unless he can show that probable injury resulted to him by reason of the service of the disqualified juror. Overruling *Bracken-ridge v. State*, 27 Tex. App. 513, 11 S. W. Rep. 630, and other cases.—*Leeper v. State*, Tex., 14 S. W. Rep. 398.

30. CRIMINAL PRACTICE—Time and Place of Offense.—An information that does not state in its body the place where the offense was committed is nevertheless sufficient if the venue is mentioned in the caption, and the words of reference "then and there" are used in charging the crime.—*State v. S. A. L.*, Wis., 46 N. W. Rep. 498.

31. DEATH BY WRONGFUL ACT—Damages—Mental Anguish.—In such an action by a mother for the death

of her son the court instructed the jury that in assessing the plaintiff's damages they might consider not only the pecuniary value of his services had he lived, but also the mental pain and suffering caused by his death: *Held*, that it was error to allow consideration of such mental pain and suffering, though Comp. Laws Utah, § 3179, provides that in such an action the jury may give such damages as "under all the circumstances of the case may be just."—*Webb v. Denver & R. G. W. Ry. Co.*, Utah, 24 Pac. Rep. 616.

32. DECEIT—Representations of Agent.—In an action for false representations concerning land sold by defendant to plaintiff, an instruction that if the agent of defendant made the representations relied on, and if afterwards defendant informed plaintiff that he had never seen the land, and that his only knowledge of it was derived from others, and plaintiff then accepted the deed without further inquiry, he could not recover, was properly refused where there was evidence that the agent had made such representations on the express authority of defendant, and had told defendant that he had made them before the sale was completed.—*Haskell v. Starbird*, Mass., 25 N. E. Rep. 14.

33. DEED—Construction.—A deed of conveyance from the St. Paul, Minneapolis & Manitoba Railway Company to the St. Paul Union Depot Company, and a lease from the latter company to the former, considered and construed with reference to the rights of the first-named corporation to the exclusive use and occupation of certain specified railway tracks and adjoining platforms in the train-house, or annex to a depot building.—*St. Paul, M. Ry. Co. v. St. Paul U. D. Co.*, Minn., 46 N. W. Rep. 566.

34. DEED—Construction.—Land was conveyed to a trustee "in trust for the use of J. D. and until the said J. D. shall arrive to the age of 21 years, or for the use of the heirs of her body lawfully begotten, and in case the said J. D. should die without heirs as aforesaid, or before she arrives at the age stipulated, then the said trust is to continue for the use of H. D.:" *Held*, that the absolute fee vested in J. D. on her reaching the age of 21.—*Smithwick v. Wintersmith*, Ky., 14 S. W. Rep. 354.

35. DEED—Description.—A deed described the land conveyed as beginning at a certain rock, and running one mile east, one mile north, one mile west, and one mile south, to place of beginning; and also stated that it was the land set off to a certain Indian under a treaty with the government. The Indian had previously selected his land as "a tract one mile square, the exact boundaries of which may be defined when the surveys are made." After the deed was given, the Indian's land was located and patented so as to include 610 acres not in the form of a square, no part of which lay within the boundaries named in said deed: *Held*, that the deed, being for a specific tract of land, could not be construed to convey the grantor's interest in the land actually patented to the Indian.—*Prentice v. Northern Pac. R. Co.*, U. S. C. C. (Minn.), 43 Fed. Rep. 270.

36. DEED—Recording—Priorities.—In 1870 G conveyed certain land to B, and before the deed was recorded, conveyed the same land to H, who paid the price in reliance on B's representations that G had attempted to make him a deed which had been destroyed because it did not convey the land in question: *Held*, that under Rev. St. Mo. 1889, § 2420, declaring that an unrecorded deed of realty shall not be valid, except as between the parties and such as have actual notice thereof, the conveyance to H was entitled to priority over that to B, though not first recorded.—*Miller v. Merine*, U. S. C. C. (Mo.), 43 Fed. Rep. 261.

37. DESCENT AND DISTRIBUTION—Advancement.—An intestate had during his life bought certain mining stock which he had transferred to him as trustee, and which he charged on his account-books to his daughters, also crediting them with a dividend on said stock. He never gave his daughters possession or control of the stock, and he afterwards sold it, and converted the proceeds to his own use: *Held*, that the stock was not advanced to them, since the gift was not irrevocable.—*Herkimer v. McGregor*, Ind., 25 N. E. Rep. 145.

38. **DIVORCE—Desertion.**—Mere declarations of a willingness to resume marital relations, without any effort to put an end to a separation, are of little weight in an action for divorce on the ground of desertion.—*Broom v. Broom*, N. J., 20 Atl. Rep. 377.

39. **DIVORCE—Desertion.**—When a husband, not entirely blameless for the act, makes no effort to prevent his desertion by his wife, and acquiesces in and appears satisfied with its continuance, he is not entitled to a divorce on the ground of desertion.—*Herold v. Herold*, N. J., 20 Atl. Rep. 375.

40. **EMINENT DOMAIN—Abutting Property.**—Where a railroad company constructs its road in front of a person's tract of land, and in close proximity to his residence: *Held*, in an action to recover damages by the owner against the railroad company, that he can recover for any damages he may have sustained, in respect to his property, not suffered in common by the public generally. Injuries resulting from smoke, soot, and cinders from passing engines are proper elements of damage.—*Omaha & N. P. R. Co. v. Janacek*, Neb., 46 N. W. Rep. 478.

41. **EQUITY—Laches.**—A year and a half after a sale of land at auction the vendor sued to set it aside because of an agreement between the vendee and another restraining the latter from bidding, of which the vendor averred he had no knowledge "at the time of the sale and conveyance." The question of laches was raised on motion to nonsuit, and there was no offer to amend: *Held*, that the delay was unreasonable and fatal to the action.—*Hammond v. Wallace*, Cal., 24 Pac. Rep. 837.

42. **EVIDENCE—Insolvency.**—The insolvency of a corporation at a particular time is not shown by proof that several weeks after that time it made a general assignment for the benefit of creditors.—*Redding v. Godwin*, Minn., 46 N. W. Rep. 563.

43. **EVIDENCE—Opinion.**—On a contest as to the correctness of a credit placed on a note, testimony of the witness who entered the credit that he would not have committed such a mistake as putting a credit of \$117 when only \$17 had been actually paid, is mere opinion, and incompetent.—*Weed v. Martin*, Ala., 8 South. Rep. 132.

44. **EVIDENCE—Physician's License.**—In an action for medical services rendered by M, plaintiff's assignor, where the defense was that M had no license to practice medicine, the president of the the medical board of W county testified that a license to practice was issued to M, signed by witness; that witness told M it had to be signed by the probate judge; that M stated that he would go and have it done, and started toward the probate judge's office, but whether the license was signed and registered the witness did not know; and that from the time the license was issued M practiced medicine in W county, until he left the State, about 16 years later. It also appeared that the probate court records had been burned: *Held*, that this was sufficient to warrant the introduction of secondary evidence as to whether the license was duly signed and registered.—*Kilgore v. Stanley*, Ala., 8 South. Rep. 130.

45. **EXECUTION—Injunction.**—The collection of an execution issued on a judgment for costs will not be enjoined on the ground that the execution is for a larger sum than the costs, as taxed, where it does not appear that the judgment debtor has paid, not only the amount of costs as taxed, but also interest on the same, since a judgment for costs bears interest.—*Eaton v. Markley*, Ind., 26 N. E. Rep. 150.

46. **EXECUTION—Married Women.**—A married woman having, by the terms of the settlement, executed in 1848, the use for life in the trust property, which was hers prior to the marriage, and retaining over the fee an absolute power of disposition by deed or will, is wholly independent of the trustee since the enactment of the married women's law of 1866, and her life-estate in the property is subject to levy and sale for her debts.—*McLaughlin v. Ham*, Ga., 11 S. E. Rep. 889.

47. **EXECUTOR AND ADMINISTRATOR—Foreign Administrators.**—Under Rev. St. Wis. § 3267, it is not necessary to file the copy of the appointment in more than one county, and that need not be a county in which an action is brought, or in which there is property belonging to the estate.—*Murray v. Norwood*, Wis., 46 N. W. Rep. 499.

48. **FEDERAL COURTS—Jurisdictional Amount.**—In an action on county bonds and the interest coupons there-to attached, the coupons constitute "interest" within Act Cong. March 3, 1857, as amended August 13, 1858, providing that the United States circuit courts shall have jurisdiction in certain cases where the amount in dispute exceeds \$2,000 exclusive of "interest" and costs.—*Howard v. Bates County*, U. S. C. C. (Mo.), 43 Fed. Rep. 276.

49. **FRAUDS, STATUTE OF.**—The purchaser of land at auction sale, finding himself unable to comply with the terms of the sale, notified the vendor that he would have to let it go. Thereupon the vendor verbally agreed to give him different terms: *Held*, that such agreement amounted to a new contract of sale, which, being verbal, could not be enforced.—*Wilson's Assignee v. Beam*, Ky., 14 S. W. Rep. 362.

50. **GAMING.**—Gen. St. Ky. art. 1, ch. 47, § 4, provides that, where the loser or his creditor fail within six months, to sue for what has been lost, any other person may sue the winner, and recover treble the amount lost: *Held*, that it was a good defense to such an action that the winner had in good faith refunded his winnings to the loser.—*Schooler v. Turner*, Ky., 14 S. W. Rep. 360.

51. **GUARDIAN AND WARD.**—Under Rev. St. Ind. 1881, § 2528, which provides that a court may order the land of a minor to be sold on application of his guardian whenever a better investment of its value can be made, an application stating that it would be for the interest of the minor to exchange his land for certain other land, is sufficient to give the court jurisdiction to order a sale of the minor's land for cash.—*Nesbit v. Miller*, Ind., 25 N. E. Rep. 148.

52. **HIGHWAYS—Dedication.**—In trespass by a landowner against the road overseer for tearing down a fence which the plaintiff had constructed so as to encroach on the road, evidence that plaintiff had formerly built other fences in such a manner as to indicate an intention to dedicate the land on which the fence in controversy was put to the public as a highway, and had allowed the public to use the road up to such fences for a number of years, is sufficient to take the case to the jury on the question of dedication and prescription.—*Bartlett v. Beardmore*, Wis., 46 N. W. Rep. 494.

53. **HUSBAND AND WIFE.**—A husband may lawfully give his wife a deed or mortgage to secure a pre-existing bona fide debt owing to her, and such conveyance is not fraudulent as to his other creditors, if taken in good faith, and without any fraudulent purpose.—*Ward v. Parlin*, Neb., 46 N. W. Rep. 529.

54. **HUSBAND AND WIFE—Mechanic's Lien.**—Gen. St. Ky. art. 2, ch. 52, § 2, provides that real estate of a married woman shall not be liable for her debts, except debts for necessities evidenced by writing signed by her. Article 1, ch. 70, § 1, allows mechanics' liens on land for buildings or improvements made by contract with or by the written consent of the owner: *Held*, that the land of a married woman was not subject to a lien for improvements placed on it without any written contract with her, since the two statutes should be construed together.—*Passmore v. Eastin's Adm'r.*, Ky., 14 S. W. Rep. 356.

55. **HUSBAND AND WIFE—Partnership.**—Under Code Ala. 1886, §§ 2342, 2349, a husband and wife may enter into a partnership with each other.—*Schlapback v. Long*, Ala., 8 South. Rep. 113.

56. **INJUNCTION—Raising Grade of Street.**—In a suit to restrain defendants from raising the level of the street in front of plaintiff's hotel, it appeared that they were about to raise it three feet above the level of plaintiff's

property: *Held*, that this was an obstruction of plaintiff's reasonable use of the street, for which injunction would lie in the absence of anything to show that defendants were proceeding under legal authority in a legal manner.—*Schaufele v. Doyle*, Cal., 24 Pac. Rep. 834.

57. **INSOLVENCY—Preferences.**—Where a Massachusetts creditor sells his claim against a debtor of the same State to a citizen of another State before the debtor is adjudged insolvent, the assignee in insolvency cannot recover from the creditor the amount obtained from his claim, though at the time of the sale the creditor and his purchaser knew that the debtor was in fact insolvent, and though the sale was made for the purpose of the creditor's obtaining a preference over the other creditors by enabling the purchaser to maintain an action on the claim in another State after the debtor was declared insolvent.—*Proctor v. National Bank of the Republic*, Mass., 25 N. E. Rep. 81.

58. **INSURANCE—Conditions of Policy.**—*Held*, upon the facts, the notice to and the oral consent of the local agent did not bind the company, and that the additional insurance, obtained without the written consent stipulated in the policy, rendered the policy void.—*German Ins. Co. v. Heiduk*, Neb., 46 N. W. Rep. 481.

59. **INTOXICATING LIQUOR—Original Package.**—A box containing whisky in bottles was shipped from Illinois to Iowa, and while in the latter State the box was opened by a resident of Iowa, who sold one of the bottles of whisky, contrary to the Iowa statute. For this he was convicted by a justice, and he applied to be released on *habeas corpus*, because his sale was protected under the interstate commerce clause of the national constitution: *Held*, that he should not be released, since the question whether the bottle or the box was the original package was sufficiently doubtful to make the proper remedy an appeal, rather than an application for *habeas corpus*.—*Allen v. Black*, U. S. C. C. (Iowa), 43 Fed. Rep. 228.

60. **INTOXICATING LIQUORS—Sale to Minor.**—A liquor dealer who sells whisky to a boy, on his representation that it is needed for his sick mother's immediate use, and that his father had sent him for it in a hurry without giving him a written order, though within the letter, is not within the spirit, of Pen. Code Tex. art. 376.—*Waldsten v. State*, Tex., 14 S. W. Rep. 394.

61. **JUDGMENT—Married Woman—Publication.**—A judgment against a married woman, founded on service by publication, in which she is designated by her maiden name, instead of her husband's surname, is not binding, nor admissible in evidence against her in any other suit.—*Freeman v. Hawkins*, Tex., 14 S. W. Rep. 364.

62. **JUDGMENT—Vacation.**—Under Rev. St. Ind. 1881, § 336, which provides that the court shall relieve a party from a judgment taken against him through his mistake, inadvertence, surprise or excusable neglect, where judgment is rendered by default against a married woman in an action to which she had a good defense because her attorneys withdrew their appearance on being told to do so by her husband, who acted without authority from her, being induced to do so by the threats of the adverse party, such judgment should be set aside on her application.—*Crescent Brewing Co. v. Oullins*, Ind., 25 N. E. Rep. 159.

63. **JUDICIAL NOTICE.**—The circuit court of one county is bound to take judicial notice as to whether a person signing an execution issued by a circuit court of another county is in fact clerk of that court, and may inform itself of that fact in any way it may deem best, but is not required to receive oral evidence to disprove the same.—*White v. Rankin*, Ala., 8 South. Rep. 118.

64. **JUDICIAL SALE.**—A judgment which directs the sale *en masse* of a considerable tract of land to satisfy a lien for an amount less than half the value of the land, when there is nothing to show that the land is not susceptible of division, is erroneous.—*Skaggs v. Hill*, Ky., 14 S. W. Rep. 363.

65. **JUSTICES OF THE PEACE—Jurisdiction.**—Code Ala. 1876, § 754, provides that two justices shall be elected in

each precinct, and section 3609 that if there is no justice in a precinct, or if he is incompetent, the cause may be tried by the justice of an adjoining precinct: *Held* that the justice of an adjoining precinct has no jurisdiction in another, unless it appear that both of the justices in the latter are incompetent or disqualified.—*Horton v. Elliott*, Ala., 8 South. Rep. 103.

66. **LANDLORD AND TENANT—Emblements.**—A tenant of farm land, whether for a term certain or uncertain has a right, after the expiration of his term, to enter upon the demised premises, and cut and carry away all the grain which he has sown, but which was not ripe when his term expired.—*Corle v. Monkhouse*, N. J., 20 Atl. Rep. 367.

67. **LANDLORD'S LIEN—Notice.**—B mortgaged his crops to defendant for supplies furnished by the latter. At the time the mortgage was executed, and before the crops were planted, B represented to defendant that he was on land which he had purchased conditionally, and was paying rent and advances to plaintiff, and that his custom would be worth little to defendant unless he could get money to pay for the land: *Held*, that this was sufficient to make it the duty of defendant to inquire, before disposing of the crops, as to the existence of the landlord's lien in favor of plaintiff.—*Manasses v. Dent*, Ala., 8 South. Rep. 108.

68. **LIMITATION OF ACTIONS—Interest.**—Where money is deposited in a bank under an agreement that it shall bear interest to be credited to the depositor semi-annually, the statute of limitations will not begin to run against the depositor's right to recover such interest, until he has notice that it is no longer credited to him.—*Marion Nat. Bank v. Fidelity T. & S. F. Co.*, Ky., 14 S. W. Rep. 371.

69. **MALICIOUS PROSECUTION—Probable Cause.**—In an action of P. K. against the C. B. & Q. Ry. Co. for malicious prosecution in the arrest and trial of the plaintiff for the larceny of railroad ties, on the oath and evidence of B. F. P., the agent of defendant: *Held* that, if from the evidence the agent had reasonable ground for suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the accused was guilty of the offense, and that the agent believed that he was guilty, then there was probable cause for the prosecution of the accused.—*Chicago, B. & Q. R. Co. v. Kriski*, Neb., 46 N. W. Rep. 520.

70. **MINES—Adverse Suit—Equity.**—A suit brought pursuant to Rev. St. U. S. § 2326, which provides that one who has filed in the land-office an adverse claim to an application for patent shall "commence proceedings in a court of competent jurisdiction to determine the question of the right of possession," is cognizable in equity.—*Doe v. Waterloo Min. Co.*, U. S. C. C. (Cal.), 43 Fed. Rep. 219.

71. **MORTGAGE—Foreclosure—Interpleader.**—A judgment creditor, who has levied on the property of his debtor after it has come into possession of a receiver appointed in a foreclosure suit, which, the creditor alleges, was collusively brought in order to defeat his recovery, may, on disclaiming any intention to interfere with the possession of the receiver, be permitted to intervene in the foreclosure suit.—*Farmers' L. & T. Co. v. Toledo & S. H. R. Co.*, U. S. C. C. (Mich.), 43 Fed. Rep. 223.

72. **MORTGAGES—Foreclosure.**—After a judgment had been rendered against a certain person, he and his father confessed judgment on a promissory note, the son being the principal debtor, and the father merely a surety. The father then secured the judgment, so confessed, by mortgage. After the father's death the mortgage was foreclosed: *Held*, on petition of the heirs for the surplus that, as between them on the one hand and the son and the first judgment creditor on the other hand, the interest of said son in the gross proceeds of said mortgage sale should first be charged with the whole amount due on the mortgage.—*Manning's Ex'r v. Brown*, N. J., 20 Atl. Rep. 381.

73. MORTGAGES—Power of Sale.—A foreclosure sale, under a power of sale in a mortgage, of separate tracts of land as one tract is not void, but only voidable.—*Ryder v. Hulett*, Minn., 46 N. W. Rep. 559.

74. MORTGAGES—Redemption.—A judgment creditor who has redeemed sufficient property of his debtor from foreclosure to satisfy his judgment cannot make a valid redemption of other property.—*Scripter v. Bartleson*, U. S. C. C. (Minn.), 43 Fed. Rep. 259.

75. MUNICIPAL CORPORATIONS—License.—A city charter giving the city council power "to license and tax all exchange, loan, and brokers' offices, and agencies of insurance office in said city," authorizes the council to compel each insurance agent to procure a separate license for each company he represents.—*Simrall v. City of Covington*, Ky., 14 S. W. Rep. 369.

76. MUNICIPAL CORPORATIONS—Powers—Wharves.—In the absence of any special statutory authority, a city has no power to lease a public wharf to private persons.—*Bateman v. City of Covington*, Ky., 14 S. W. Rep. 361.

77. MUTUAL BENEFIT INSURANCE.—Where a member of a mutual benefit society attempts to change the beneficiary named in his certificate, and complies with all the regulations of the society in making the change, except that he does not surrender the certificate as required by the by-laws, being unable to do so, because the certificate had been wrongfully taken from him, his mortuary benefit should be paid to the person whom he attempted to substitute as beneficiary, since the by-laws cannot require impossibilities.—*Isgrigg v. Schooley*, Ind., 25 N. E. Rep. 157.

78. NEGOTIABLE INSTRUMENTS.—Where a purchaser of negotiable paper before maturity takes it with knowledge of facts which impeach its validity between antecedent parties, or with a belief, based upon circumstances brought to his knowledge before the purchase, that the maker had a defense to the note, such purchaser is not an innocent holder, and the paper is subject to the defenses existing between the maker and payee.—*Meyers v. Bealer*, Neb., 46 N. W. Rep. 479.

79. OFFICE AND OFFICERS—Removal.—Under Pen. Code Cal. § 772, providing that when an accusation "in writing, verified by the oath of any person," is presented against any officer, the court shall cite him to appear, and then "hear, in a summary manner, the accusation," the proceedings may be on a written charge by a private person, and need not be by indictment or information in the name of the people.—*Woods v. Varnum*, Cal., 24 Pac. Rep. 843.

80. PARTIES—Pleading—Assignment.—Where a half interest in a contract had been equitably assigned, the assignor and assignee may join as co-plaintiffs in an action upon it.—*Singleton v. O'Brien*, Ind., 26 N. E. Rep. 154.

81. PARTNERSHIP.—In an action on account for goods sold and delivered to R. & Co., one W. H. R., before the delivery of part of the goods, purchased the interest of R in the firm business, and assumed his share of the debts. As testified to by one of the witnesses, "he stepped into the shoes of R." Held, that the testimony shows that W. H. R., as a member of the new firm, assumed the debts of R in the firm of R. & Co.—*Richards v. Hene*, Neb., 46 N. W. Rep. 477.

82. PRINCIPAL AND AGENT—Fraud.—An agent to collect rents and pay taxes on land cannot acquire a valid tax-title against his principal by omitting to pay the taxes, and himself purchasing at a tax-sale, when he has rents sufficient in his hands to pay the taxes. Nor can such agent purchase the certificates of sale for his wife, and have a valid tax-title made to her, for his knowledge of the fraud is constructively hers.—*For v. Zimmermann*, Wis., 46 N. W. Rep. 533.

83. PUBLIC LANDS—Mineral Land.—Where a grant to a railroad company excepts mineral land, the term "mineral land" means land known to be mineral land when the grant took effect or which there was then satisfactory reason to believe to be such.—*Francoeur v. Newhouse*, U. S. C. C. (Cal.), 43 Fed. Rep. 236.

84. RAILROAD COMPANIES—Eminent Domain.—Under Rev. St. Ind. 1881, § 3963, which provides that where the title to any railroad right of way shall fall or has not been acquired the company or the land-owner may apply for a writ for the assessment of damages, the land-owner is not barred from his right to such writ by the fact that he voluntarily permitted the railroad company to enter upon and appropriate his land.—*Midland Ry. Co. v. Smith*, Ind., 25 N. E. Rep. 133.

85. REAL ESTATE AGENT—Commissioners.—In an action by a real-estate agent for commissions for the sale of land, the defense was that the authority to sell was conditional on defendant's being able to purchase a certain other lot: Held, that it was competent for defendant to show that he made reasonable effort to make such purchase, as such proof tended to show his good faith.—*Wilson v. Klein*, Ala., 8 South. Rep. 130.

86. RECEIVER—Appointment.—Where a manufacturing corporation has debts exceeding its capital stock, and it is unable to meet its paper as it matures, and its assets are in such condition that they are not available either as security or collateral for the purpose of borrowing or for the purpose of conversion, and it is apparent that enough would not be realized from a forced sale of its plant and accounts to meet its obligations, which will soon become due, and where its credit is gone, and its directors have of their own accord executed a deed of trust of all the corporate property for the benefit of certain creditors to secure paper indorsed by the directors, and where the trustee has taken possession, an application by the non-preferred creditors to enjoin further proceedings under the deed of trust and for the appointment of a receiver will be granted.—*Consolidated Tank-Line Co. v. Kansas City Varnish Co.*, U. S. C. C. (Mo.), 43 Fed. Rep. 204.

87. RELIGIOUS SOCIETIES—Personal Liability of Members.—A voluntary unincorporated religious society, whose financial and secular affairs were managed by a board of trustees elected from time to time by the congregation, together with the officiating priest, and the secretary and treasurer also so elected from time to time, became indebted to the priest for money advanced for the construction of a church building, and also for part of his salary allowed to remain in arrears. The secretary kept regular books showing all these accounts, and from time to time during the course of many years the accounts were balanced, and the amount due the priest publicly stated in church when the congregation was assembled. Finally a committee of the officers made a final settlement of the account by balancing the accounts on the books, and thus fixing the amount to be paid: Held, that the members of the society were individually liable for such balance.—*Sheehy v. Blake*, Wis., 46 N. W. Rep. 537.

88. REMOVAL OF CAUSES.—It is no ground for a motion to remand a cause to the State court that the petition for removal was not joined in by one of the defendants, who is merely a nominal defendant, against whom plaintiff seeks no relief, and who asks no relief against plaintiff.—*Henderson v. Cabell*, U. S. C. C. (Tex.), 43 Fed. Rep. 257.

89. REMOVAL OF CAUSES—Federal Question.—A suit against a receiver appointed by a federal court, brought in a State court without leave of the federal court, is removable, since it involves a federal question.—*Evans v. Dillingham*, U. S. C. C. (Tex.), 43 Fed. Rep. 177.

90. RES ADJUDICATA.—Where the boundary of land is determined by a judgment affirmed by the court of appeals, the propriety of that decision cannot be questioned in a subsequent suit between the same parties.—*Hurst v. Combs*, Ky., 14 S. W. Rep. 578.

91. SALE—Misrepresentation.—Where a contract is procured by fraud and misrepresentation, it cannot be enforced on the ground that the deceived person should have been more vigilant and not have signed until made aware of its contents by some other person, if he was unable to read.—*Warder v. Whitish*, Wis., 46 N. W. Rep. 540.

92. **SALE—Unlawful Purpose.**—Plaintiff, a corporation, by its agent, sold and furnished bottled beer to the defendant, the keeper of a house of prostitution, as the agent well knew. While he had no knowledge of just what was to be done with the beer, the agent supposed at the time it was furnished that it was to be used or sold in the brothel. No other facts appearing, it is held that plaintiff can recover a balance claimed to be due from the defendant for and on account of said sale.—*Anheuser-Busch Brewing Ass'n v. Mason*, Minn. 46 N. W. Rep. 558.

93. **SALE—Warranty.**—The purchaser of personal property must have relied upon the statements made by the seller, as to the quality of the article sold, in order to maintain an action for a breach of the warranty. The vendor is liable for patent defects in the property sold, if it is so stipulated in the warranty.—*Watson v. Roode*, Neb., 46 N. W. Rep. 491.

94. **SCHOOL OFFICERS—Moderator.**—A moderator of a school district is not required to take an oath of office.—*Franz v. Young*, Neb., 46 N. W. Rep. 528.

95. **SPECIFIC PERFORMANCE—Part Performance.**—Held, upon the facts, that complainant had not clearly established the contract to devise land nor shown such part performance of it as to entitle her to a decree of specific performance.—*Sturges v. Taylor*, N. J., 20 Atl. Rep. 369.

96. **STATE—Suit against—Injunction.**—A suit by a citizen of California to enjoin the persons constituting the board of land commissioners of the State of Oregon from selling certain swamp lands, claimed by the plaintiff, as forfeited to the State for non-compliance with a condition of a former sale of the same lands by the State to the plaintiff's grantor, is not a suit against the State of Oregon; it appearing that the legislation under which the defendants claim the right to act is unconstitutional and void, because it impairs the obligation of the contract of the State with such grantor.—*McConaughy v. Pennoyer*, U. S. C. O. (Oreg.), 43 Fed. Rep. 196.

97. **STATUTE—Construction.**—Where a statute (Rev. St. Wis. § 3294) provides that acts or omissions shall be deemed to be misdemeanors within the meaning of the statute when "especially declared by law" to be such, it is the statute law of the State, and not the common law that is meant.—*State v. Grove*, Wis., 46 N. W. Rep. 532.

98. **STATUTE—Implied Repeal.**—Act Ind. 1889 (Elliot, Supp. § 829 et seq.), punishing cruelty to animals, being broader and more exact than the former statute on the same subject (Rev. St. Ind. 1881, § 2101), such former statute is repealed by the clause in the act of 1889 repealing all statutes inconsistent with it.—*State v. Giles*, Ind., 25 N. E. Rep. 159.

99. **SURVIVAL OF ACTION—Death by Wrongful Act.**—Under 2 Comp. Laws Utah 1888, §§ 3157, 2961, 2962, where a person sued for a wrongful ejectment from a train, and, pending an appeal by the defendant, died from the effects of the ejectment, his administrator could not continue the case, the cause of action of decedent consisting of defendant's wrongful act, and the wrongful act coupled with the death constituting the representatives' cause of action.—*Mason v. Union Pac. Ry. Co.*, Utah, 24 Pac. Rep. 796.

100. **TAXATION—Assessment—Possession.**—Where a man lives with his wife and family on land owned by her, but standing of record in the name of another person, the possession is deemed to be in the husband, and not the wife, within Gen. St. Mass. ch. 11, § 8 (Pub. St. ch. 11, § 18), providing that real estate is to be assessed to the person who is either the owner or in possession thereof on the 1st day of May, the person appearing owner of record to be deemed the true owner.—*Southworth v. Edmonds*, Mass., 25 N. E. Rep. 106.

101. **TAXATION—Exemption.**—An exemption from taxation of the capital stock and "all the property and effects" of a railroad company will not be extended by

implication to outlying and detached lands which the corporation had no power to acquire when the exemption was granted, but which were acquired under a power granted by the subsequent charter.—*Ford v. Delta & Pine Land Co.*, U. S. C. C. (Miss.), 43 Fed. Rep. 181.

102. **TAX-DEED—Description of Land.**—A tax-deed of "30 acres of land located in Yates precinct, Madison county, Kentucky, adjoining the lands of William Witt and listed for the year 1881 in the name of Rice Bengel," is void for want of a sufficient description of the land conveyed.—*Gooch v. Bengel*, Ky., 14 S. W. Rep. 375.

103. **TAX-SALE—Fraud—Quietting Title.**—A suit to set aside a tax-sale on the ground of fraud may be maintained by the owner, though he is not in possession of the land, since it is not a suit to quiet title.—*Herr v. Martin*, Ky., 14 S. W. Rep. 356.

104. **TAX-TITLES.**—A tax-deed of lands in Wisconsin held, in accordance with the statutes of that State and the decisions of its supreme court, to be conclusive evidence of title in the grantee, after the lapse of the statutory period of limitations; the land being unoccupied, but constructively, as held by such decisions, in the possession of the grantee in the tax-deed.—*Bronson v. St. Croix Lumber Co.*, Minn., 46 N. W. Rep. 570.

105. **TENDER—Deed.**—Defendants agreed to cause to be conveyed to plaintiff, by deed, certain land, payment to be made at a certain time: Held, that it was not necessary for plaintiff to tender to defendants a deed for execution, but only to tender the money due under the contract.—*Chaffield v. McDaniel*, Cal., 24 Pac. Rep. 839.

106. **TRADE-MARKS—Cigar-Makers' Labels.**—A label adopted by the International Cigar-Makers' Union, to be pasted on boxes containing cigars made by members, is not a legal trade-mark, it not indicating by what persons the cigars are made, but only that they are made by members of one of the local unions; the right to use it belonging equally to all members, and continuing only while they are members.—*Weener v. Brayton*, Mass., 25 N. E. Rep. 46.

107. **USURY—What Constitutes.**—Where drafts are from time to time deposited in a bank, some of them being payable on demand and some on time, an agreement between the bank and the depositor that credit shall be given for such drafts on the day after their deposit, the depositor being charged the full legal rate for any overdraft, does not constitute usury when such agreement is made in good faith in order to save involved calculations.—*Timberlake v. First Nat. Bank*, U. S. C. C. (Mass.), 43 Fed. Rep. 231.

108. **VENDOR AND VENDEE—Contract.**—Defendant contracted to sell land to plaintiff, and stipulated that the money paid therefor was to be returned in case he failed to execute and deliver a deed "after one year from date" of the contract. It was agreed that time was of the essence of the contract. Held, that the deed was to be delivered one year from the date of the contract, and a tender of it nine days after the expiration of the year was not a compliance with the contract.—*Vorwerk v. Nolte*, Cal., 24 Pac. Rep. 840.

109. **VERDICT—Joint Defendants.**—Suit was brought against L and A as individuals and as partners on a promissory note signed "L. & Co." A pleaded *non est factum*, while L relied on other defenses: Held, that a finding of the jury in favor of plaintiff against L, without saying anything as to A, was equivalent to a finding in A's favor.—*Handley v. Lawley*, Ala., 8 South. Rep. 101.

110. **WILLS—Right of Devisees.**—A will which provides that the residue of the testator's estate shall be equally divided between his children, but directs when the division is made one of the children, naming her, shall have her share set off to her in other kind of property than slaves, does not vest the legal title of the residue of his real estate in his executors, but vests it in the children, as tenants in common, until the partition shall be made.—*Simmons v. Spratt*, Fla., 8 South. Rep. 123.